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EMPLOYERS' LIABILITY
WORKMEN'S COMPENSATION
AND
LIABILITY INSURANCE

THE DISTINCTION BETWEEN THE LIABILITY TO PAY COMPENSATION AND THE LIABILITY FOR DAMAGES FOR INJURIES WHICH ARE NOT WITHIN THE COMPENSATION ACT OF NEW YORK STATE

STATE COMPENSATION INSURANCE COMPARED WITH LIABILITY INSURANCE BY STOCK COMPANIES AND MUTUAL ASSOCIATIONS

The Workmen's Compensation Law, Annotated

By

Jeremiah F. Connor

Formerly Counsel to the State Workmen's Compensation Commission and the State Industrial Commission of the State of New York

PRICE $5.00

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INTRODUCTION.

The Workmen's Compensation Law of the State of New York (Chapter 67 of the Consolidated Laws, as enacted by Chapter 816 of the Laws of 1913 and re-enacted by Chapter 41 of the Laws of 1914, with amendments) made a radical change in relation to the liability of employers for damages because of accidental injuries. The result has led to much confusion between injuries which are compensatable and injuries which may be made the basis of damage suits.

Part I of this work is intended to relieve this confusion. The compensation act is explained and cases of dual liability and optional remedies, as well as cases which are not covered in any manner by the compensation law, are classified and supplemented by such annotations of authorities as are available.

Part II is devoted to the subject of compensation and liability insurance. Here again confusion exists more particularly in relation to state insurance covering the payment of compensation. Nothing has been attempted in this connection except to show the nature of this and other forms of insurance, to explain the so-called immunity claimed on behalf of State Fund insurance, and to point out that the State Insurance Fund is created for the purpose of insuring employers against the payment of compensation, and under its contract or insurance policy, only insures against compensation liability.

Part III contains the workmen's compensation law as amended, including the amendments made by the Legislature of 1916. It is annotated with all decisions of the Courts under the New York act and with decisions of the Workmen's Compensation Commission and its successor, the State Industrial Commission. The appendix contains the Employers' Liability Act of New York State, the elective compensation law, and the provisions of the State constitution affecting the liability of

the employers and the rights of employees, together with the Federal Employers' Liability Act.

The author was chief counsel for the State Workmen's Compensation Commission of the State of New York from the time the compensation law became effective, July 1, 1914, until this Commission was superseded by the State Industrial Commission, June 1, 1915, and was chief counsel for the State Industrial Commission until January 1, 1916. During this period of time, the author had complete charge of all legal matters relating to the compensation law and feels that he has had a part in the growth and development of the judicial decisions under which the Act has been interpreted. It has been the aim of the author to make this volume useful in the practical application of compensation legislation to the liability of employers and the rights of employees both in relation to compensation and to injuries which are not covered by the compensation act, and to explain in a practical manner the distinction between the different forms of insurance under which employers may give security for the payment of compensation and relieve themselves from further liability in cases which are not the subject of compensation.

The distinctions between the different forms of Employers' Liability are based to a large extent upon the law in New York State. They apply to the subject generally, however, and especially to those states having compensation statutes similar to the New York Act.

The part devoted to state insurance applies to all states where the State Insurance Fund is created to operate in competition with other forms of insurance except insofar as the wording of the statutes may be different. The annotations to the compensation law cover a wide field. The cases passed upon by the Courts include those in which no opinions were written. Many of the decisions by the Commission are unreported, but all will be found useful in the determination of claims not only in New York State but also under compensation statutes generally.

May 1, 1916. JEREMIAH F. CONNOR, Oneida, N. Y.

ABBREVIATIONS.

NOTE—The abbreviations used in this work refer to the following reports, viz.:

APP. DIV.—New York Supreme Court, Appellate Division.

ATL. REP.—Atlantic Reporter.

B. W. C. C.—Butterworth's Workmen's Compensation Cases (English).

FED. REP.—Federal Reporter.

MASS.—Masachusetts Reports.

N. E.—Northeastern Reporter.

N. C. C. A.—Negligence and Compensation Cases, Annotated.

N. Y.—New York Reports.

N. Y. ST. DEP. REP.—New York State Departmental Reports.

N. Y. SUPP.—New York Supplement.

PAC. REP.—Pacific Reporter.

U. S.—United States Supreme Court Reports.

W. C. C.—Workmen's Compensation Cases (English).

TABLE OF CONTENTS

PART I

WORKMEN'S COMPENSATION AS DISTINGUISHED FROM EMPLOYERS' LIABILITY

		PAGE
SEC. 1.	HISTORY OF COMPENSATION LEGISLATION IN NEW YORK	4
" 2.	PLAN AND PURPOSE OF THE COMPENSATION LAW	5
" 3.	EMPLOYMENTS SUBJECT TO THE ACT	7
" 4.	INJURIES SUBJECT TO THE ACT	8
" 5.	COMPENSATION AND DEATH BENEFITS	11
" 6.	EMPLOYEES NOT WITHIN THE ACT	12
" 7.	DUAL EMPLOYMENTS	13
" 8.	DOUBTFUL EMPLOYMENTS	16
" 9.	EMPLOYMENTS EXPRESSLY EXEMPTED	18
" 10.	NON-HAZARDOUS EMPLOYMENTS	20
" 11.	CASUAL EMPLOYMENTS	23
" 12.	SALESMEN	24
" 13.	INJURIES RESULTING IN DISFIGUREMENT	26
" 14.	DEPENDENTS WHO RECEIVE NO COMPENSATION	28
" 15.	INJURIES RECEIVED BY OFFICE EMPLOYEES	29
" 16.	OFFICERS OF CORPORATIONS	30
" 17.	DAMAGES FOR LOSS OF SERVICES	32
" 18.	OCCUPATIONAL DISEASES	32
" 19.	INJURIES RECEIVED OUTSIDE THE STATE	34
" 20.	ADMIRALTY JURISDICTION	36
" 21.	ADMIRALTY JURISDICTION—OPTIONAL REMEDY OF EMPLOYEES	38
" 22.	THE FEDERAL EMPLOYERS' LIABILITY ACT—RAILROAD EMPLOYEES	39
" 23.	INDEPENDENT CONTRACTORS	43
" 24.	EMPLOYEES INJURED THROUGH NEGLIGENCE OF THIRD PERSONS	45

PART II

COMPENSATION AND LIABILITY INSURANCE

PAGE

SEC. 25. SECURITY FOR PAYMENT OF COMPENSATION 51
" 26. SELF-INSURANCE 54
" 27. INSURANCE BY STOCK COMPANIES AND MUTUAL ASSOCIATIONS 54
" 28. THE STATE INSURANCE FUND—COVERAGE 57
" 29. STATE INSURANCE FUND—RELEASE FROM PAYMENT OF COMPENSATION 59
" 30. STATE INSURANCE FUND—IMMUNITY 62
" 31. ADMINISTRATION OF THE STATE INSURANCE FUND ... 65

PART III

THE WORKMEN'S COMPENSATION LAW, ANNOTATED 73
RULES ADOPTED UNDER THE COMPENSATION LAW 175
INDEX OF HAZARDOUS EMPLOYMENTS 195

APPENDIX

EMPLOYERS' LIABILITY ACT AND ELECTIVE COMPENSATION LAW 205
RAILROAD LAW, SECTION 64—INJURIES TO RAILROAD EMPLOYEES 216
STATE CONSTITUTION, ART. 1, SEC. 19—AUTHORIZING THE COMPENSATION LAW 218
STATE CONSTITUTION, ART. 1, SEC. 18—RELATING TO DEATH CASES 218
CODE OF CIVIL PROCEDURE, SEC. 1902—RELATING TO DEATH CASES 219
FEDERAL EMPLOYERS' LIABILITY ACT 220

TABLE OF CASES PENDING IN UNITED STATES SUPREME COURT.

The following cases arising under the Workmen's Compensation Law of the State of New York are pending in the United States Supreme Court. The cases had been argued but had not been decided at the time this work went to press. They involve the constitutionality of the law generally and its application to interstate commerce, including railroad employees and employees of vessels:

JENSEN VS. SOUTHERN PACIFIC CO., 215 N. Y. 514.

WALKER VS. CLYDE S. S. CO., 215 N. Y. 529.

WINFIELD VS. NEW YORK CENTRAL & HUDSON R. R. R. CO., 168 APP. DIV. 851; 153 N. Y. SUPP. 499; 216 N. Y. 284.

WHITE VS. NEW YORK CENTRAL & HUD. R. R. R. CO., 216 N. Y. MEMO. 653.

PART I.

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" 7. DUAL EMPLOYMENTS.
" 8. DOUBTFUL EMPLOYMENTS.
" 9. EMPLOYMENTS EXPRESSLY EXEMPTED.
" 10. NON-HAZARDOUS EMPLOYMENTS.
" 11. CASUAL EMPLOYMENTS.
" 12. SALESMEN.
" 13. INJURIES RESULTING IN DISFIGUREMENT.
" 14. DEPENDENTS WHO RECEIVE NO COMPENSATION.
" 15. INJURIES RECEIVED BY OFFICE EMPLOYEES.
" 16. OFFICERS OF CORPORATIONS.
" 17. DAMAGES FOR LOSS OF SERVICES.
" 18. OCCUPATIONAL DISEASES.
" 19. INJURIES RECEIVED OUTSIDE THE STATE.
" 20. ADMIRALTY JURISDICTION.
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" 22. THE FEDERAL EMPLOYERS' LIABILITY ACT—RAILROAD EMPLOYEES.
" 23. INDEPENDENT CONTRACTORS.
" 24. EMPLOYEES INJURED THROUGH NEGLIGENCE OF THIRD PERSONS.

§ 1. History of compensation legislation in New York. The legislature of New York adopted a compulsory compensation act in 1910 which applied to certain dangerous employments. This law was immediately attacked in the Courts upon the ground that it authorized the taking of property without due process of law in violation of the 14th amendment to the Federal constitution and in violation of Section 6 of Article I of the State Constitution. It was declared unconstitutional by the Court of Appeals in the case of *Ives vs. South Buffalo Railway Co., 201 N. Y. 271,* in January, 1911. This decision was based principally upon the provision of the act which imposed the payment of compensation upon employers who had not been guilty of any fault contributing to the injury. The Court of Appeals indicated that the decision might have been different had the Act been authorized by the State constitution.

An amendment to the constitution permitting the enactment of a compulsory statute for the payment of compensation without regard to fault was adopted by the people at the general election in 1913. The present compensation act,[1] which is the subject of this work, was passed by the Legislature in Special Session in 1913 and was re-enacted at the regular session in 1914. It was held not in violation of the Federal constitution in *Matter of Jensen vs. Southern Pacific Co., 215 N. Y. 514.*

A provision was added to the compensation law by the amendments of 1916, under which employers who are not subject to the act and their employees, may, by joint election, become subject to its provisions. There is also in force in the State of New York another elective compensation law, being Article 14 of the Labor Law.[2] Only a very few employers and employees have ever elected to come within its provisions. It is now superseded by the amendment to the compulsory act at least insofar as its provisions are inconsistent therewith.

[1] Chapter 67 of the Consolidated Laws, being Chapter 816 of the Laws of 1913, as re-enacted and amended by Chapter 41 of the Laws of 1914, and as amended by Chapter 816, Laws of 1914; Chapters 167, 168, 615 and 674, Laws of 1915, and by Chapter 622, Laws of 1916.

[2] Chapter 352, Laws of 1910.

§ 2. Plan and purpose of the compensation law. Under the general plan of the compensation statute, employers are required to pay or provide a prescribed compensation based upon the earnings of the employee for disability or death due to accidental injuries arising out of and in the course of certain enumerated hazardous employments. The employer has the option of giving security for the payment of compensation by contributing premiums to a State Insurance Fund created by the Act; by insuring with any stock corporation, or mutual association authorized to write compensation insurance, or by furnishing satisfactory proof to the Commission of his financial ability to pay compensation directly to his employees without insuring. If he fails to exercise either of these options, he is liable to a penalty equal to the premium payable to the State Fund and is subject to a suit for damages upon the part of the injured employee, or in case of death, by his legal representative or dependents, in which he is deprived of the defenses of contributory negligence, assumed risk and the negligence of fellow-servants, and since the amendments of 1916 is guilty of a misdemeanor. If he gives security for the payment of compensation, he is relieved from liability, other than compensation, for personal injuries or death sustained by employees who come within the provisions of the statute.

Payment of compensation is required without regard to fault either upon the part of the employer or the employee, except when the injury is due solely to the intoxication of the employee or is occasioned by his wilful intention to bring about the injury or death of himself or another. Rules of damages do not apply to compensation cases nor is the determination of claims governed by common law or statutory rules of evidence. A Commission is created to administer the Act and its decision is final upon all questions of fact.[1] As stated by the Supreme Court, "It was the purpose of the Legislature to create a tribunal to do rough justice—speedy, sum-

[1] Compensation Law, Section 20. Matter of Goldstein vs. Center Iron Works, 167 App. Div. 526; 153 N. Y. Supp. 224.

mary, informal, untechnical."[2] Appeals may be taken on questions of law to the Appellate Division of the Supreme Court, Third Department. While the decision of the Commission is final upon questions of fact, the Courts on appeal may examine and take into account the evidence adduced, as supplementing the findings of fact, and in all cases, the correctness of the determination of the Commission as to the application of the law to the injury upon which the claim is based remains a question for judicial review.[3]

The purpose of the statute is elaborately explained in the following extract from the opinion written by Supreme Court Justice John M. Woodward in the case of *Rheinwald vs. Builders Brick & Supply Co., 168 App. Div. 425; 153 N. Y. Supp. 598*:

> "The Workmen's Compensation Law must in fairness be deemed to have been enacted in furtherance of a legislative determination, enforced by explicit mandate of the people through amendment of the State constitution, that a new and different scheme and basis of indemnity for industrial accidents should be adopted in this State, in the light of the social experience of other commonwealths and countries. Injuries sustained by those who perform the manual and mechanical tasks of an industry must be deemed to have been intended by this statute to be made a social risk, a liability of the industry, a charge upon the production cost of the article manufactured or the service rendered. Hitherto the rule of our statute and fundamental law had been that any right of recovery for industrial accidents must arise from a breach of the master's duty as to care and safeguards, and accordingly was limited by whatever contractual relation existed between the person injured and the person whose breach of duty was the efficient cause of injury. For this historic concept of liability springing from

[2] Matter of Rhyner vs. Huber Co., 171 App. Div. 71; 156 N. Y. Supp. 903.

[3] Matter of Gleisner vs. Gross & Herbener, 170 App. Div. 87; 155 N. Y. Supp. 946.

omission of legal duty created by contractual relation there has been substituted an application of the social principle that regardless of duty and regardless of fault, the expenses and loss of earnings resultant from occupational injury to a workman engaged in carrying on an inherently hazardous business or avocation of an employer should be paid in the first instance by the employer and by him made a charge against the operating costs of the business. In place of the traditional juristic rule that the master must respond in damages when his servant is injured through the master's fault, and that otherwise the servant must go unrecompensed and the loss be borne by him alone, the people and legislature have now put in force the changed concept that the *trade product* should be charged with all consequences of inherent trade hazards and that losses to individual workers through disability while engaged in the service of the proprietor of the business, should be distributed among all its consumers or patrons, rather than left to operate ruinously against the disabled employee or the solitary employer."

§ 3. **Employments subject to the Act.** Compensation laws differ widely as to the field of occupations which are subject to their provisions. In some states the law is general in its terms and applies to all employments except those expressly exempted. Most statutes of this kind exempt farm laborers, domestic servants and casual employees. Other laws apply only to hazardous employments named in the statute itself. The New York law is of the latter class. Its application is limited to the hazardous employment enumerated in Section 2 and divided into 42 groups. After June 1, 1916, any employment can be made subject to the act by joint election of the employer and his employees. An employer under the New York act is one employing workmen in a hazardous employment and an employee entitled to its benefits is one working in such hazardous employment. The act is further limited by the requirement that the

employment in question must be one which is carried on by the employer for pecuniary gain, but this limitation does not apply to municipal employees after June 1, 1916. Farm laborers and domestic servants are exempted.

Generally speaking, two classes of employers are subject to the compensation law. The first class consists of those specifically mentioned in Section 2 and the other class is made up of those engaged in a business which is not included in Section 2, but in connection with which certain workmen are engaged in one or more of the hazardous employments covered by the act. Employers conducting a mercantile business may be given as an example of the class to which the law has this limited application. While the general employees of a mercantile house are not engaged in hazardous work, the workman driving a vehicle would be under the Act. The mercantile business is not classified as hazardous but the driver of the vehicle is performing work declared hazardous by group 41.

(See also Sec. 10 Post.)

§ 4. **Injuries subject to the Act.** The amendment to the State constitution authorized a compensation law which would apply to injuries received by employees in the course of the employment. The Legislature has limited the application of the statute in this respect by defining injuries as meaning accidental injuries arising out of and in the course of the employment and such disease and infection as may naturally and unavoidably result from such injuries. Three requisites, therefore, must exist before an injury can be regarded as compensatable. The injury must be *accidental;* it must *arise out of* the employment and it must have happened *in the course of* the employment. If any one of the three requisites is absent, no compensation is payable.

The most common definition of the term "accident" as used in compensation statutes is found in a decision by the House of Lords under the compensation law of England in the case of *Fenton vs. Thorley* 5 W. C. C. I; (1903) A. C. 433. There the term was defined as "an

unlooked for mishap or an untoward event which is not expected nor designed." This definition was based to some extent upon the decision of the United States Supreme Court in the case of *U. S. Mutual Accident Association vs. Barry, 131 U. S. 100.* The use of the word "designed" in this definition would exclude deliberate injuries such as result from an assault and the House of Lords, in the case of *Trim Joint District School vs. Kelley, 7 B. W. C. C. 274,* extended the definition to include assault cases.

The English definition of the term "accident" was adopted in New York by the Workmen's Compensation Commission in Matter of *Yume vs. Knickerbocker Portland Cement Co., 3 N. Y. St. Dep. Rep. 353, affirmed without opinion, 153 N. Y. Supp. 1151, appeal dismissed 216 N. Y. Memo. 653,* and in the *Matter of Harnett vs. Thos. J. Steen Building Construction Co., 2 N. Y. St. Dep. Rep. 492, affirmed without opinion 153 N. Y. Supp. 1119, appeal dismissed 216 N. Y. 101.* In both of these cases the injuries were due to assaults by fellow employees. It was held that the word "designed" referred to the state of mind of the injured workman and that injuries resulting from the designed assault of a fellow employee were accidental injuries.

The term "arising out of the employment" has been the subject of considerable discussion. Generally speaking, an injury does not arise out of the employment unless it can be traced to some risk which is inherent in the business or to some accident which is the natural result of the employment. The construction of the phrase most widely adopted is taken from a decision by the Supreme Judicial Court of Massachusetts in the case *In re Employers Liability Assurance Corporation, 102 N. E. 697; 215 Mass. 497.* There the Court said:

> "It arises 'out of' the employment when there is apparent to the rational mind upon consideration of all the circumstances, a causual connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have

followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment."

Reduced to simpler language this decision means that the industry must cause or contribute to the injury, and that injuries to which all persons are exposed independent of the employment, are excluded.

The phrase "in the course of the employment" relates to the time and place and gives rise to much less difficulty. While the accident must happen during the period of the employment, the benefits of the act are not confined to the time during which the workman is actually doing manual labor. Accidents going to and from work are usually excluded but may be compensatable in exceptional cases such as where the only method of reaching the work is one especially provided by the employer[1] and interruptions in the employment are usually covered. Employees are also under the protection of the act for a reasonable period of time subsequent to the day's work while they may be engaged in getting ready to leave the premises or arranging for the next day's work, and also for a reasonable period of time during which they may be entering or leaving the premises.[2]

In applying decisions which define injuries in other jurisdictions, a comparison of the statutes must always be made. The word "accidental" has been omitted from many of the American compensation statutes. In some states, compensation is based upon injuries in the course of the employment and in other states upon injuries arising out of and in the course of the employment. No state restricts the term "injury" more than in the New York Law.

[1] Matter of Diciaiulo vs. H. S. Kerbauch, Inc., 1 N. Y. St. Dep. Rep. 424.

[2] Matter of Di Paolo vs. Crimins Contracting Co., State Industrial Com., The Bulletin, Vol. 1, No. 3, page 7; Aff., App. Div., Third Dept., May 2, 1916.

(See cases cited under Section 3, subd. 7, Workmen's Compensation Law, Annotated.)

(See also Part I, Sec. 18, Occupational Diseases.)

§ 5. **Compensation and death benefits.** The average weekly wage of the injured employee is the basis of compensation for injuries and the amount is two-thirds of such wages. The maximum is $15 per week and the minimum is $5 per week, except that the maximum for the loss of a hand, arm, foot, leg or eye is $20 per week. Compensation for injuries which result in temporary total disability and which result in total permanent disability is payable during the continuance of the disability, except for the first two weeks. Certain specific injuries are enumerated for which compensation is payable for a fixed period of time. These include amputations and loss of members. Every injured workman is entitled to free medical attention for a period of sixty days after the injury.

The death benefits include funeral expenses not exceeding $100 and a percentage of the average wages of the deceased workman which is payable only to the persons designated in Section 16 of the statute. These include surviving wife (or dependent husband), children under 18 years of age, grandchildren or brothers or sisters under the age of 18 years, parents and grandparents. Dependency is presumed as to the surviving wife and as to children under 18 years of age. The others named in the statute, to receive compensation, must establish that they were actually dependent upon the workman at the time of the accident. Dependency is a question of fact and any degree of dependency is sufficient to authorize an award.[1] Parents may be dependent upon the earnings of a minor child,[2] and in a case where the deceased left a father and mother and a sister under 18 years of age, all three were held to be dependents.[3] Where the workman left a parent and grandparent who were dependent, both were held entitled to compensation.[4]

(See Sec. 14, Post.)

[1] Matter of Rhyner vs. Huber Bldg. Co., 171 App. Div. 71; 156 N. Y. Supp. 903.

Matter of Walz vs. Holbrook, Cabot & Rollins Corp., 170 App. Div. 6; 155 N. Y. Supp. 708.

[2] Matter of Friscia vs. Drake Brothers, 167 App. Div. 496; 153 N. Y. Supp. 892.

[3] Matter of Walz vs. Holbrook, Cabot & Rollins Corp., 170 App. Div. 6; 155 N. Y. Supp. 708.

[4] Matter of Ramsey vs. Fairbanks Morse & Co., 155 N. Y. Supp. 1136. (No opinion.)

The surviving wife receives 30% of the average weekly wage during widowhood with two years' compensation in a lump in case of remarriage and 10% for each child. When there is no widow, the children receive 15% each, and this same percentage is received by dependent grandchildren, brothers and sisters. Dependent parents and grandparents received 15% of the average weekly wages until the law was amended in 1916 (to take effect June 1, 1916) at which time their compensation became increased to 25%. The total compensation payable under the section is limited to two-thirds of the wages of the deceased. The surviving wife (or dependent husband) and children have preference over other dependents and cases will arise where the remaining dependents would receive no benefits under the act. It is apparent also that many cases will arise in which the surviving dependent will be not of the class described in Section 16 of the act, such as a dependent child, brother or sister over the age of 18 years.

§ 6. **Employees not within the act.** It is apparent from the foregoing sections that the compensation law is limited in its application. When all provisions of the act are read together, particularly the definitions contained in Section 3, compensatable injuries may be defined as accidental injuries received by an employee while engaged in a hazardous employment carried on by his employer for pecuniary gain at the plant or away from the plant in the course of the employment, which arise out of and in the course of such employment, and such disease or infection as may naturally and uavoidably result therefrom, for which compensation or death benefits are provided.

Many employments are expressly exempted and many are omitted. As to all of these, the liability existing at common law and under the old Employers Liability Act still remains. Other employments are partly covered by the compensation law and the employer may have a workman who is within the protection of the act part of the time and to whom he may be liable in a suit for damages at other times. The compensation provided is also

limited and injuries may occur which are not compensatable and which subject the employer to damages. In case of death, where there are dependents other than of the class described in Section 16, the suit for damages still remains. In addition there remains the liability under the Federal statutes and under the jurisdiction of the Admiralty Courts. These forms of liability are treated more at length in Sections 7 to 24 which follow. They are discussed in Part II in connection with the State Insurance Fund and other forms of compensation insurance.

§ 7. **Dual employments.** Some employers are engaged in more than one line of business and one branch of the business may be under the compensation act while as to another branch, the common law or the old Employers Liability Act still applies. In *Sickles vs. Ballston Refrigerating Co. 156 N. Y. Supp. 864; 171 App. Div. 123,* the employer conducted a storage business in Ballston, N. Y., and was, therefore, engaged in a hazardous employment because the business of "storage" is included in group 29 of Section 2. The employer was likewise engaged in the business of buying and selling fruit. The claimant was injured while in the latter business and the award of compensation was reversed by the Court. Meeting the claimant's contention in support of the award, the Court said:

> "But the difficulty is that the employer was engaged in two entirely distinct kinds of business, one of which was not within the protection of the statute and that the claimant was injured in performance of his duties, which at the time of the injury, solely had reference to that kind of business not thus protected.

In another case, the employer was engaged in the manufacture of cheese, which comes within the provisions of group 33 relating to the preparation of food-stuffs. The injured workman was employed specially for the purpose of harvesting ice. An award was made upon the theory that the harvesting of the ice was incident to the business of preparing food-stuffs. This award was

reversed, the Court stating, "there is no suggestion in the statute that a common laborer engaged in harvesting ice is engaged in a hazardous occupation." The decision might have been different if a regular employee had been sent out to perform the same work, although that point was not decided.[1] So also the employee who makes deliveries of merchandise will be under the compensation law as to the driver of a vehicle[2] but not where the delivery is made on foot.[3] Ice harvesting has since been added to the law as one of the hazardous employments. In another case, in which a wholesale dealer maintained a storehouse in connection with his business, the Appellate Division decided that storage as used in Group 29 means a place of storage where the goods of others are kept for hire.[4] To meet this decision, Group 29 was amended in 1916 to include storage of all kinds. The amendment adds still more confusion to the law. A merchant who has a storehouse in connection with his business will have employees who are not subject to the Compensation Law while working about the business itself but will become subject to its provisions whenever they perform any work in connection with the place of storage.

DUAL LIABILITY IN RELATION TO TRUCK DRIVERS.

In the case, *Matter of Dale vs. Saunders Brothers*,[5] employer, and the Standard Accident Insurance Co., insurance carrier, the Appellate Division of the Supreme Court, Third Department, in a decision handed down March 8, 1916, has decided that truck drivers may at times be regarded as the employee of the owner of the truck designated as the general employer and also an employee of another person, designated as a special employer, for whom the driver may be working for the time being. In this case Saunders Brothers were manufac-

[1] Matter of Aylesworth vs. Phoenix Cheese Co., 170 App. Div. 84, 155 N. Y. Supp. 916.

[2] Matter of Costello vs. American Express Co., 217 N. Y. 179.

[3] Matter of Newman vs. Newman, 169 App. Div. 745; 155 N. Y. Supp. 665.

[4] Matter of Mihn vs. Hussey, 169 App. Div. 742; 155 N. Y. Supp. 860.

[5] —— App. Div. ——; 157 N. Y. Supp. 1062; Affirmed by the Court of Appeals April 25, 1916.

turers of brick and Dale was one of their drivers. From time to time Saunders Brothers furnished teams with drivers to one Patrick Walsh, who conducted a sand bank for the purpose of delivering sand to Walsh's customers. Upon the date of the accident, a team and wagon had been furnished to Walsh in this manner and Dale was sent as a driver. Walsh paid Saunders Brothers by the day for the team and Dale was paid by Saunders Brothers. The accident which resulted in Dale's death, happened while Dale was assisting in the loading of the wagon at the sand bank. The State Workmen's Compensation Commission awarded compensation to the widow and children against Saunders Brothers, there being some evidence to show that Saunders Brothers retained control and direction over the work performed by Dale, although at the time he was loading sand for Walsh.

In deciding that both Saunders Brothers and Walsh might be liable for compensation, the Court in an opinion written by Kellogg, P. J., said:

> "The fact that the owner of the sand pit might be liable under this law does not absolve the general employer. Dale was required to drive his team where the Saunders Brothers directed, and by requiring him to go into the sand pit and subjecting him to the increased danger there, they cannot relieve themselves from the ordinary duties and liabilities to their teamster. The fact that under the provisions of this law the employment might fall within two or more different groups and thereby two or more persons might be liable to make the compensation does not prejudice the injured employee or his family. It furnishes an additional guarantee that payment will be made. The general employer, where the injury occurs within the lines of the general employment, is liable, and that liability is not destroyed by the fact that the special employer may also be liable, thus giving the employee a choice of remedies with but one compensation."

In a previous case, *Matter of Gimber vs. T. P. Kane Co., 2 N. Y. St. Dep. Rep. 475, affirmed without opinion, 155 N. Y. Supp. 1109,* where the facts were almost identical, the Commission awarded compensation against the special employer instead of the general employer. This decision of the Commission was based upon a conclusion that the special employer had control over the work performed by the driver. The award in the Gimber case was affirmed by the Appellate Division in November, 1915, upon the authority of *Miller vs. North Hudson Contracting Co., 166 App. Div. 348.*

The Dale case was affirmed in the Court of Appeals upon the ground that the general employer should be held liable under the general purpose of the Compensation Law. The Court did not pass upon the question of dual liability established by the Appellate Division. The decision of the Court of Appeals, however, is contrary to the decision of the Appellate Division and is also contrary to the decision of the Appellate Division in the Gimber case.

§ 8. **Doubtful employments.** The attempt upon the part of the Legislature to classify the hazardous industries into 42 groups leaves many in what may be termed as a twilight zone. This is particularly true in relation to group 30 which includes the manufacture or preparation of meat or meat products and as to group 33, covering the preparation of food stuffs. In one of its earliest cases, the State Workmen's Compensation Commission decided that the preparation of meats and the preparation of food stuffs did not mean the ordinary preparation of meat or food stuffs for cooking purposes but involved a preparation by some mechanical device or a preparation which either changed the form of the material to render it suitable for use, or changed the nature of the material for the same purpose.[1] In this case, the claim was made by the widow of an employee who was working as a butcher or assistant chef at the Hampton Hotel in Albany, N. Y. While boning a leg of mutton,

[1] Matter of De La Gardelle vs. 158 N. Y. Supp. 162.
Hampton Co., 167 App. Div. 617;

his knife accidentally slipped, severed an artery and caused his death. The claim for compensation was denied by the Commission and this decision was affirmed by the Court. The decision is especially important because it excludes from the statute employees engaged in the preparation of meat or food stuffs for cooking purposes in hotels and restaurants. One of the judges writing in relation to the case, gives the application of these two groups in the following language:

> "Groups 30 and 33 of Section 2, of the statute under consideration, which enumerates and defines hazardous employments cannot, in my judgment, be regarded as covering any employment consisting of the preparation of meat or food stuffs for cooking purposes, in the ordinary course of household duties, domestic service or the conduct of hotels or restaurants in which meats or foods are prepared and cooked for eating on the premises. * * * These groups, as phrased by the Legislature, relate obviously to employment in industrial establishments or manufactories where meats, fruits, vegetables and similar food stuffs are prepared for sale for consumption elsewhere."

Before the groups were enlarged by the amendments of 1916, there was much doubt concerning the application of the law to many other employments. Meat markets, which are now included in Group 30, were not within the protection of the act as to the employees generally,[2] but an employee in a meat market engaged in the preparation of meat by means of an electric meat chopper was held to be within Group 30.[3] As already pointed out, ice harvesting, and storage except where the goods of others are stored for hire, were not within the act until the statute was amended. Horseshoeing was included by the Commission upon the theory that this work involved the manufacture of small castings, forging or metal wares within the meaning of Group 23. This ruling of the Commission was reversed by the

[2] Matter of Newman vs. Newman, 169 App. Div. 745; 155 N. Y. Supp. 665.

[3] Matter of Kohler vs. Frohman, 167 App. Div. 533; 153 N. Y. Supp. 559.

Supreme Court in *Matter of Grady vs. Holliday, 155 N. Y. Supp. 1110.* Horseshoeing and blacksmithing are now both included in Group 24. The operation of elevators which now comes within the provisions of Group 22 was another doubtful employment. The Commission included elevators as vehicles under Group 41. This decision was affirmed by the Appellate Division in *Matter of Wilson vs. Dorflinger, 170 App. Div. 119; 155 N. Y. Supp. 857,* which was reversed by the Court of Appeals in a decision handed down April 25, 1916, in an opinion written by Bartlett, Ch. J. Another questionable employment related to druggists whose employees were held to come within the act because, as stated by the Court, a wholesale druggist might reasonably be inferred to be engaged in the manufacture of drugs and chemicals.[4]

Confusion also frequently arises in cases where an employer is performing work for or in connection with the property or business of another. Architects, insurance companies and others frequently send inspectors or other employees to superintend, inspect and otherwise look after the erection of buildings. It is a mooted question whether employees of this character may be regarded as engaged in the erection of the building. In a claim against an employer who furnished watchmen to protect merchandise which had been unloaded from vessels, the employee was held to be engaged in longshore work and the Commission awarded compensation. The act has never been construed by any Court as to this class of cases but the reasoning in other cases indicates that such employers would not be regarded as engaged in hazardous employments.

§ 9. **Employments expressly exempted.** This class includes farm laborers, domestic servants and employments in a trade, business or corporation which is not carried on for pecuniary gain or operated for profit. The rights and liabilities as between the employer and employee in all of these classes is governed by the old

[4] Matter of Larsen vs. Paine Drug Co., 169 App. Div. 888; 155 N. Y. Supp. 759; aff. —— N. Y. ——; Court of Appeals, May 12, 1916.

law of master and servant. Farm laborers doubtless include laborers engaged in farm work for canning industries and for florists. It also includes employees engaged in the operation of haypresses, threshing machines, shredders and evaporators except where these occupations are carried on as a separate business, in which event, although neither is classified as hazardous, some of the employees would be under the compensation law and others would be governed by the rules of common law.

While a chauffeur is not classed as a domestic servant, one engaged in the operation of a pleasure car does not come within the act because the employment is not carried on for pecuniary gain. A chauffeur taking his employer to and from his place of business is not under the act, but would be if the automobile is used in connection with the business. Chauffeurs employed in the operation of motor trucks, taxicabs, or other vehicles in connection with a business, are, of course, included under Group 41, relating to the operation of vehicles. The chauffeur of a physician is held to be under the act because the car in such case is operated in an occupation conducted for profit.

Employments which are not operated for a profit cover a large field. They include the erection of private buildings, the management and care of private estates, charitable institutions, hospitals, churches, clubs, schools, colleges and universities. Private schools or sanatoriums conducted for profit are not, however, exempted. In determining what employments are excluded under this subdivision the question of profit is not necessarily deciding. It is the purpose which controls. If the purpose is to make and distribute a profit to the owners, the business is conducted for pecuniary gain no matter whether profit or loss results from its operation. On the other hand, where the owners distribute no profits but are engaged entirely in charitable undertakings, such as the Salvation Army, the employment is excluded.

See cases cited under Section 8, subd. 5, The Workmen's Compensation Law, Annotated.

§ 10. **Non-hazardous employments.** The employments which are subject to the compensation act have been treated upon brifly in Section 3. As stated by Supreme Court Justice Geo. F. Lyon in the *Matter of Newman vs. Newman,*[1] "the benefits of the workmen's Compensation Act are restricted to injuries or death incurred by employees engaged in one or more of the specified hazardous employments." The employments which are not thus specified may be designated as non-hazardous employments.

The distinction between the two classes, hazardous and non-hazardous, is explained in the leading case, *Matter of Gleisner vs. Gross & Herbener.*[2] Speaking of hazardous employments, the Court said, "If an employee is hired for work falling exclusively or predominantly within one or more of the enumerated occupations, his right to compensation for injury in the course of his employment cannot fairly be made to hinge on a finding that he was, at the moment of injury, engaged in an act clearly constituting the direct doing of work named in the act," and in another place, "If an employee's duties are exclusively or predominantly within an enumerated employment or employments, and he is injured while doing work fairly within the scope of the ordinary and accustomed fulfilment of such duties, he has a rightful claim, even though the particular act he was doing when mishap befell him, would not, of and by itself, ordinarily be described by the use of phraseology contained in the statute or as the doing of work enumerated in the statute." It is not to be assumed from this quotation that every employee working in a designated hazardous employment is subject to the compensation law or that every injury is compensatable for, as stated by the same Court, and as appears by the sections of this work which follows:

> "The Legislature has not attempted to impose upon employers the obligation of insuring their employees generally against accident."

[1] 169 App. Div. 745; 155 N. Y. Supp. 665.

[2] 170 App. Div. 87; 155 N. Y. Supp. 946.

In the Gleisner case, the employee was a janitor. Neither this class of work nor the business of his employer is declared hazardous. The employee, however, also performed general repair work and at times was engaged in the operation of a boiler. Upon the appeal from an award made by the Commission, the point of the case was stated by the Court in the following language:

> "The whole question here at issue is whether at the time the claimant met with mishap, he was doing work and engaged in an employment which the Legislature has designated as 'hazardous' and so has brought himself within the purview of the new system of compensation for industrial accidents created by the Workmen's Compensation Law."

and speaking of the employee's right to compensation, the Court stated that

> "If, within the scope of his duties, he was injured while actually and unmistakably doing, at the moment, work of a kind specifically defined as 'hazardous,' his right is clear."

and the award of compensation was reversed because, at the time of the accident he was not performing hazardous work. After referring to employments which are mentioned in the Act, the Court laid down the following rule, which applies to non-hazardous employments:

> "Where, however, as apparently here, the employee's ordinary duties and accustomed scope of activities do not come exclusively or predominantly within the category of enumerated employments, and only casually and incidently does he do work fairly falling within that category, his right to remuneration must hinge on a finding that he sustained injury while actually and momentarily doing work named in the statute."

Matter of Newman vs. Newman is also a case in point in relation to non-hazardous employment. The injured workman was employed in a retail meat market as a driver on a delivery wagon. He also worked in the store waiting on trade and made deliveries on foot. In dismissing the award of compensation, the Court said: "He

had put his horse up several hours before, and was engaged in the occupation of a deliveryman on foot. This occupation was not included in any of the groups of hazardous employments, nor was it on this occasion a part of, or in any way connected with, a delivery by horse and wagon, nor can it be said, under the circumstances, to have been a risk incidental to a hazardous employment."

It follows from the foregoing that an employer who is engaged in a business which is not named in Section 2 of the Act is subject to the payment of compensation where his employees are doing work named in the statute but at all other times is liable to suits for damages under the old rule of law as between master and servant.

§ 11. **Casual employments.** In the *Matter of Bargey vs. Massaro Macaroni Co., 170 App. Div. 103; 155 N. Y. Supp. 1076,* it was decided that workmen employed occasionally to do repairs upon a plant where a hazardous employment is carried on are excluded from the compensation law. In the case in question, the employer was engaged in a business that was classified as hazardous under the compensation act. The claimant's husband was hired as a carpenter to erect a partition in the plant. In deciding the case and reversing the award made by the commission, the Court said:

> "He was not in the general employ of the company, but was the man it usually employed to do little odd jobs about its building. He never did any work in the macaroni business; his only work for the defendant was doing work upon or about its buildings. I do not think he was an employee in a business declared hazardous by the Workmen's Compensation Law. Clearly, he was not engaged in the macaroni business, but his job was as a carpenter. The company was not carrying on the carpenter business or doing any carpenter work for a profit; it was making repairs and improvements on its real estate and hired a general workman for that purpose."

Prior to this decision the Commission had ruled that

carpenters, painters and other mechanics, employed occasionally by a person not engaged in a hazardous employment, were subject to the compensation law. In the Bargey case, the Court expressly held that such employees are not within the benefits of the compensation act. The Court recognized that where a regular employee is performing work which is not hazardous in itself but is incidental to the general work carried on by the employer, such work may be considered as part of the hazardous employment, and it was then stated, "but where a man engages a carpenter by the hour to do some work upon his premises in the way of improvements, I cannot feel that he is engaged in the hazardous employment of structural carpentry or repair of buildings as contemplated by Group 42 of the law." The decision in this case is supported by the fact that only a few of the 42 groups contain the word "repair" from which it would appear that the Legislature intended to exclude repair work except where it is expressly mentioned.

The tenor of this decision is to place carpenters, painters and employees in trades similar thereto under the compensation law only when such persons are in the employ of one whose business is that of carpenter work, painting or the like. A mechanic of this character employed casually by the day by a manufacturer or other employer is not under the Compensation Law. The employer is still liable to such employees for negligence and in the Bargey case, after compensation was denied, suit was brought for damages under the law as it existed before the compensation law was enacted. The Bargey case was followed by the Commission in a decision rendered February 10, 1916, in Claim No. 14407, *McComsey vs. Simmonds* (The Bulletin, Vol. 1, No. 6, p. 13), in which the workman received injuries while painting a barn for his employer.

An attempt has been made to meet the decision in the Bargey case by amending the definition of the term "employee" and by adding a new subdivision to Section 3 of the act under which the words "manufacture," "con-

struction," "operation" and "installation" are defined as including repairs. These amendments do not, however, meet the point raised by the Court to the effect that a company engaged in the manufacturing business is not carrying on the carpentry business for pecuniary gain when it employs a carpenter to make repairs to its place of business.

§12. **Salesmen.** The Commission has ruled that salesmen who are required to work or report at the plant where the hazardous employment is carried on are subject to the compensation law whether the injury happens at the plant or while the salesman is travelling. Employees of this character are to some extent subjected to the risk of the hazardous employment while on the premises and the Commission's ruling regarding accidents at the plant appears to be sound. An award was upheld where a salesman in the employ of a clothing manufacturer received an injury by falling from a ladder while looking at a price ticket on a piece of cloth which was to be used in making a suit of clothes.[1] The widow of a sales manager was held entitled to compensation by reason of a fatal injury which the employee received by falling on the stairs while passing from the floor where the manufacturing was conducted to the upper floor where the office was situated.[2]

Where the injury is received away from the plant, the salesman is subject to no greater risk than one travelling for the ordinary mercantile establishment. When the injury is received while installing machinery which the employee has sold, compensation is payable,[3] but where, as in the Matter of Sickles (Sec. 7 infra.), the injury happens on the road and has no connection with the risk of the hazardous employment, the compensation law has no application. In the Sickles case the employer conducted a storage business, which is classified as hazardous un-

[1] Matter of Berlinger vs. Ritchie & Cornell, Aff. 156 N. Y. Supp. 1115. (Without opinion.)

[2] Matter of Nicholson vs. Klipstein & Co., Aff. 155 N. Y. Supp. 1127. (Without opinion.)

[3] Matter of Benton vs. Fraser, Aff. 156 N. Y. Supp. 1115. (Without opinion.)

der Group 29. He bought and sold fruit and some or all of the fruit purchased was placed in the storehouse. The employee was a purchasing and sales agent and was injured while engaged in the course of his employment in West Virginia, the Court said:

> "I do not think the work in which the claimant was engaged when he received his injury has any logical or appropriate connection with the storage business. That business implies merely the housing and care of property within a storehouse or other appropriate place of deposit. * * * And whatever dangers and hazards may be incident to the storage business certainly have no connection with travelling through the country as a purchasing or sales agent. * * * It certainly was not the legislative intent in using the word 'storage' and making it a hazardous employment to include therein the duties of a purchasing agent, which differ in no respect merely because the objects of his purchases may find their way into a storage house."

Under this decision a salesman or travelling man injured away from the plant is left to his common law remedy. The risk of injury while travelling does not arise out of any hazardous employment but is common to all.

In a decision handed down by the Appellate Division of the Supreme Court, Third Department, since this work was in press, in *Matter of Robert Lyon vs. Windsor & Davis,* it was held that a salesman employed by a firm engaged in the manufacture of women's clothing was not entitled to compensation for injuries received by falling while passing through the factory. It was held that "the ordinary activities of salesmanship are not embraced within the manufacture of the article being sold." This decision excludes a salesman from the benefits of the Workmen's Compensation La weven though the injury happens at the plant. In this case the Appellate Division decided that the Compensation Law did not make the employer's business the test and that the benefits of the act had not been conferred upon all employees. It was said, "The employee's right to compen-

sation arises when *he* does work enumerated in the statute." The amendment of the term "employee" by Chapter 622 of the Laws of 1916 was intended to meet this situation and to bring all employees within the protection of the Act where the business is classified as hazardous.

§ 13. **Injuries resulting in disfigurement.** The Appellate Division of the Supreme Court, Second Department, in the case of *Shinnick vs. Clover Farm Co., 169 App. Div. 236; 154 N. Y. Supp. 423; S. C. 152 do. 649,* has decided that where the schedules of compensation do not cover the injury suffered by an employee, he does not fall within the purview of the compensation act and cannot claim compensation under it, for the act provides no scale or gauge by which to determine what compensation should be provided. In the case in question, the plaintiff was in the defendant's employ as a driver and was injured by the attack of a horse which resulted in the amputation of a portion of one of plaintiff's ears. The suit was brought for damages and plaintiff's right to recover was upheld for the reason that Section 15 of the compensation act did not provide any fixed compensation for the amputation of an ear and consequent disfigurement. "As to such an injury, therefore," the Court said, "the right to recover remains as it was before the act was passed."

This decision has been the subject of much discussion and criticism. Many students of compensation laws are of the opinion that the New York act can be extended to a case of this character for the reason that such an injury might result in total disability or in death, in which event the right of compensation could not be reasonably disputed. The Shinnick case, however, was passed upon by nine justices of the Supreme Court, all of whom agreed that the injury in question was outside the compensation act and was properly the subject of damages. It must be accepted as the law in relation to injuries of this character.

Many cases have arisen in which actions have been commenced to recover damages for injuries which have resulted in disfigurement. These actions are supported by the decision in the Shinnick case and also derive sup-

port from the amendment to the State constitution under which the compensation act was passed by the Legislature. Literally construed, this amendment to the constitution authorizes the enactment of a compensation statute excluding all other remedies only where compensation is provided for the injury in question. To exclude the damage suit, the Legislature must provide a substitute in the shape of compensation. The term "compensation" as defined by subdivision 6 of Section 3 of the act, does not include the medical services which the employer is required to provide under Section 13, and such medical services are not considered as compensation.

The Shinnick case was decided July 9, 1915. Four days later the Court of Appeals handed down its decision upholding the constitutionality of the compensation law generally in the Jensen case (215 N. Y. 514). Although the point was not squarely decided, the decision of the Court of Appeals may be construed as holding that the compensation law is exclusive and in full substitution for any action for damages, even though no compensation is provided for the specific injury. This view of the decision of the Court of Appeals was taken by Supreme Court Justice William S. Andrews in a decision handed down in Special Term, March 22, 1916, in the case of *Michael Connors vs. Semet-Solvay Co.*, in which he refused to follow the Shinnick case. In the Connors case the plaintiff had received compensation and then sued for damages for disfigurement and pain and suffering.

Under an amendment to Section 15, which became effective June 1, 1916, the Commission is now authorized to award compensation for injuries resulting in serious facial or head disfigurement not to exceed thirty-five hundred dollars. The Shinnick case is, therefore, no longer an authority in support of an action to recover damages for disfigurement as to any injury occurring subsequent to June 1, 1916. An amendment to Section 11 is intended to make the law exclusive even as to injuries for which no compensation is provided. As al-

ready pointed out, such a provision is ineffectual under the State constitution.

§ 14. **Dependents who receive no compensation.** As pointed out in Section 5, the compensation where the injury results in death, is limited to the dependents mentioned in Section 16 of the compensation law and many cases will arise where the deceased workman leaves dependent relatives surviving who cannot be awarded compensation under the act. At common law there was no right of action where the death of a person was due to negligence. The right was first created by Chapter 450 of the Laws of 1847 and since 1895 a provision has been contained in the constitution (Art. 1, Sec. 18) which prohibits the Legislature from abrogating the right of action to recover damages in death cases. The constitutional amendment (Art. 1, Sec. 19) under which the compensation law is authorized, provides in effect that nothing contained in the constitution shall prohibit the Legislature from the enactment of a law requiring the payment of compensation without regard to fault, or to limit the power of the Legislature "to provide that the right of such compensation and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries."

The rule is well settled that all sections of the constitution must be construed together to obtain its true meaning and when Sections 18 and 19 are both considered, it would seem to follow that the legislature cannot take away the right to recover damages in death cases unless a substitute is provided therefor. The compensation law is exclusive of all other rights and remedies as to the dependents mentioned in Section 16, but the right to recover damages as guaranteed by Section 18 of the Constitution, still remains as to the dependents for whom compensation is omitted.

In the case of *Shanahan vs. Monarch Engineering Co., 156 N. Y. Supp. 143,* the Supreme Court held that damages may be recovered on behalf of brothers and sisters who are the only next of kin of the deceased workman. It was held that the compensation law makes no

provision for the payment of any benefit to the surviving brothers and sisters and that as to them, the right to sue for damages still remains. In *Matter of Friscia vs. Drake Brothers,* (Sec. 5 infra), it was decided that compensation could be awarded to the parents of a deceased workman notwithstanding the fact that he left him surviving no wife or children. Under this decision brothers and sisters under 18 years of age would be entitled to compensation where there is no surviving wife or children or where the compensation payable to surviving wife and children does not equal 66 2/3% of the average weekly wage of the deceased. The Shanahan case is somewhat contrary to the Friscia case, but it is regarded as an authority in support of the right of dependents to sue for damages in all cases where such dependents receive no compensation. It may frequently happen that a child, sister or brother over 18 years of age, or some other next of kin not named in the statute, is entirely dependent upon the deceased workman and will suffer serious pecuniary loss by his death.

Section 11 of the compensation act declares the liability for the payment of compensation as prescribed by Section 10 shall be exclusive *and in place of any other liability whatsoever, to such employee, his personal representatives, husband, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death.* The part in italics was added to Section 11 by the amendments of 1916, and among other things was intended to meet the decision in the Shanahan case. While the language of the section is explicit, it will doubtless be held unconstitutional as to dependents for whom no benefits are provided.

§ 15. **Injuries received by office employees.** According to a ruling made by the State Workmen's Compensation Commission, office employees who work at the plant where a hazardous employment is conducted, are within the protection of the compensation law; and office employees who work in a separate office building, although in the service of an employer carrying on a

business within the act, are not within its protection. As to injuries received by the latter class, it is apparent that the employer is not liable for compensation and that the remedy of the employee is to sue for damages if the injuries are due to the negligence of his employer.

The ruling of the Commission in relation to office employees where the office is located at the plant has never been passed upon by the Courts. The trend of decisions in other cases, however, would seem to indicate that an office employee is not entitled to compensation in any event, even where the office is located at the plant, unless the injury can be traced to some risk of the hazardous employment. In the *Matter of DeVoe vs. New York State Railways, 169 App. Div. 472; 155 N. Y. Supp. 12,* the Justice writing the opinion laid down the rule that the compensation law did not apply to employees generally, even of a particular group, but only while the employee was engaged in the hazardous employment. The following quotation from the opinion in this case seems to clearly indicate that the employer is under no obligation to pay compensation to office employees:

> "The employee of a street railway, for instance, who is engaged *in bookkeeping* or in running errands or in doing other work disconnected with the physical operation of the railroad, would not be 'engaged in the following hazardous employment,' nor would he be entitled to compensation, though the accident might be said to have arisen out of and in the course of his employment * * *. The question is, not whether he was employed by a street railway corporation, but whether he was engaged in the following hazardous employments."

§ 16. Officers of corporations. In nearly all jurisdictions it has been decided that an officer of a corporation is not an employee within the ordinary definition of the latter term and that statutes beneficial in character relating to "employees" have no application to officers of corporations. The Workmen's Compensation Commission was advised in making rules for the interpretation of the statute that the distinction between the term

"employer" and "employee" as used in the compensation law was similar to the distinction between the term "master" and "servant" and that officers of corporations could not be regarded as employees within the meaning of the act. This rule has been greatly modified in practice.

In all cases where an officer of the corporation was performing work of a character usually performed by a superintendent, foreman, mechanic or ordinary workman, the officer was held to be an employee and entitled to the benefits of the act. Up to the present time, these decisions have not been questioned by employers or insurance carriers. In a case where the deceased employee was president of a local telephone company and met his death while performing work as a lineman, the widow was awarded compensation.[1] In another case, where the employer was secretary and general manager of the company, compensation was awarded for an injury received while he was engaged in superintending the plant.[2] In still another case, compensation was awarded for the amputation of fingers due to an injury received while the officer of the company was operating machinery.[3] A similar rule has been adopted in Connecticut, where compensation was awarded to an officer who received injuries while acting as salesman for his company.

The New York State Industrial Commission has also decided that the ownership by the injured workman of practically all of the stock in a corporation does not preclude him from receiving compensation. This was held in the *Matter of Kennedy vs. Kennedy Mfg. & Engineering Co.* (The Bulletin, Vol. 1, No. 5, p. 12), decided January 8, 1916, in which the injured workman had retired from the office of president and was acting as consulting engineer. He was the owner of all but 7½% of the stock of the company and it was decided that his ownership of practically the entire amount of stock did not change his status as an employee of the

[1] Claim No. 15410, Matter of A. Foster Brewster, deceased.

[2] Claim No. 6230, Matter of John H. Wagner.

[3] Claim No. 42660, Matter of Joseph Clements.

company. In this case an award of compensation was denied, however, because he continued to draw his regular salary notwithstanding the injury and suffered no pecuniary loss.

§ 17. **Damages for loss of services.** At common law in the case of an injury to a boy or girl under 21 years of age, a right of action existed on behalf of the person injured, and the parents had another and separate right of action for the damages sustained by them for loss of services. There was also a double remedy at common law in the case of an injury received by a married woman. She had the right to sue for damages for personal injuries and the husband could recover for the loss of her services and for medical treatment.

In the State of Massachusetts, the Supreme Judicial Court, in the case of *King vs. The Viscolloid Co., 219 Mass. 420; 106 N. E. 988,* decided that the mother could recover damages for loss of services notwithstanding the fact that the boy who was injured had received compensation under the Workmen's Compensation Law of that state. It was also held that a provision requiring the employer to pay medical expenses did not take away the parents' remedy, but only reduced the amount of damages which the parent could otherwise recover.

Section 10 of the Workmen's Compensation act requires the employer to pay or provide compensation according to the schedules of the act and Section 11 makes this liability exclusive. The right to recover damages for loss of services was not expressly taken away until Section 11 was amended in 1916 and damages could be recovered for loss of services as to any accident which happened prior to June 1, 1916. The question is not free from doubt even under the amended law. To make the act entirely exclusive a remedy should have been provided in lieu of the former action for loss of services.

§ 18. **Occupational diseases.** Only accidental injuries can be made the basis of compensation. The use of the word "accident" excludes what is known as occupational diseases, which include lead poisoning, zinc poisoning and any injury, such as an injury to the eye or the

lungs, which is not due to some particular accident but to long and continued exposure to some condition or hazard under which the work is being performed. In the State of Massachusetts where compensation is not limited to accidental injuries, disability from lead poisoning was held compensatable[1] but under the New York Act all claims for disability due to occupational diseases are excluded.

In a case where there was an injury to the eye due to the fact that the employee was required to work before a bright light, and in another case where blood poisoning was contracted from dust particles, and in all cases of occupational poisoning compensation was denied by the New York Commissions. In the following cases, which may be regarded as border line cases, compensation was allowed: where pulmonary tuberculosis was caused by falling into water;[2] where disability was due to freezing;[3] where the employee died as a result of a disease caused by contact with poison ivy;[4] where the disability was due to anthrax contracted through an abrasion of the skin while handling wool;[5] and where the injured workman became insane as the result of a nervous shock received in an accident.[6] In another case (*Matter of McMurray, 3 N. Y. St. Dep. Rep. 395*) compensation was awarded where the workman died from heart disease due to exhaustion from overwork. This latter case would probably have been reversed had an appeal been taken. In all of the other cases the disability was traceable to a particular event which brought the injury within the definition of the term "accidental."

Although compensation is not payable for an injury which is classed as an occupational or industrial disease, the employer is liable in damages if the injury can be

[1] In re Hurle, 217 Mass. 228; 104 N. E. 336.

In re Johnson, 217 Mass. 378; 104 N. E. 735.

[2] Matter of Rist vs. Larkin & Sangster, 171 App. Div. 108; 156 N. Y. Supp. 875.

[3] Matter of Aylesworth vs. Phoenix Cheese Co., 8 N. Y. St. Dep. Rep. 383.

Matter of Cole, 4 N. Y. St. Dep. Rep. 348.

[4] Matter of Plass vs. Cent. R. R. of New England, 169 App. Div. 826; 155 N. Y. Supp. 854.

[5] Matter of Henry, Claim No. 65555, State Ind. Com.

[6] Matter of McMahon, 5 N. Y. St. Dep. Rep. 109.

traced to a violation of law or to lack of proper safeguards which would have resulted in its prevention. The employer would be liable for damages where pulmonary tuberculosis is contracted by reason of the failure to provide suitable space for employees in violation of the Labor Law. So also the employer would be liable at common law where the injury or disease, although due to no accident, could have been prevented by the use of proper and suitable safeguards or appliances for carrying on the work.

§ 19. Injuries received outside the State. In the *Matter of Valentine vs. Smith Angevine Co., 2 N. Y. St. Dep. Rep. 461,* it was decided by the Workmen's Compensation Commission that compensation was payable where the injury was received while the workman was temporarily in another state in the course of his employment. This decision was affirmed in *Matter of Post vs. Burger & Gohlke, 168 App. Div. 403; 153 N. Y. Supp. 505; 216 N. Y. 544.* The Court of Appeals held that the Legislature intended to read the workmen's compensation law into the contract of employment and that the employer and employee are bound thereby without reference to the place where the injury happens. Attention was called to the wording of the statute under which the act was extended to injuries which happen "away from the plant," and it was decided that under the general purpose of the law, which was to prevent the injured workmen and their dependents from becoming objects of charity and to make the compensation a part of the expenses of the hazardous business, compensation should be payable although the injured workman was temporarily in a foreign state when injured.

Many cases will arise where the facts are different from those outlined in the Post case. Since this decision, the State Industrial Commission has denied compensation in File No. 291, *Lloyd vs. Power Specialty Co.,* a case where the contract of hiring was made in New York State and the employee, who was a resident of New Jersey, was sent to West Virginia to perform work in which he received an injury which proved to be fatal. It

was decided by the Commission that the fact that the contract was made in New York State did not entitle the dependents of the injured workman to compensation. In the case of *Gardner vs. Horsehead's Construction Co., 171 App. Div. 66; 156 N. Y. Supp. 899,* decided by the Appellate Division in January, 1916; the accident happened at the employer's plant in Pennsylvania. The injured workman had not been employed in the State of New York since 1912. The Court reversing the award, decided that the making of the contract in this state did not, of itself, entitle the claimant to compensation where the entire work was to be performed in the state of Pennsylvania. In another case, *Matter of Pritz vs. Baumont* (*reversed 154 N. Y. Supp. 1140, without opinion*), both the claimant and the employer resided in New York State. The claimant had been working in this State but had left his employment and was subsequently engaged in the construction of a building. The employer had given no security for the payment of compensation in the State of New York but had insured under the law of the State of New Jersey as to the particular job in question. The award made by the Commission was reversed.

Both the Gardner and the Pritz cases were decided before the Court of Appeals had rendered its decision in the Matter of Post. They seem to be distinguishable, however, and it seems to be sound reasoning that as to jobs which are to be completely performed in another state, the employer is subject to the law of the state where the accident happens, at least where the employment is for the particular work alone. The plant for the purpose of such cases is located in a foreign state, which has a right to regulate its own employments. As to such cases, employers in the State of New York would be subject to liability under the laws of the state where the accident happens.

Confusion will doubtless arise where employees of another state are injured while temporarily at work in New York. This confusion can be avoided by applying the law of the state where the injured workman resides

and was employed. In Massachusetts it has been held that the compensation law has no extra territorial effect[1] and an employee coming from Massachusetts injured in the course of his employment in this state would be entitled to compensation or damages, as the case may be, under our laws. On the other hand, it has been decided in Connecticut[2] and in New Jersey[3] that the compensation laws in each of those states apply where the injury happens outside the state. It would be the duty of the Commission and of the courts to recognize the law of Connecticut and New Jersey and the only recourse of the Connecticut or New Jersey employee, although injured in this state, would be the compensation provided by his own state.

Even before any valid compensation law was in force in the State of New York, the Courts of this state gave recognition to compensation laws of other states and countries upon the legal principle that the law of the place where the contract of employment was made should govern, unless the foreign law is contrary to the policy and the fundamental law of this state. This was decided in the case of *Schwitzer vs. Hamburg-American Line, 149 App. Div. 900; s. c. 78 Misc. 448,* and to the same effect, see also *Albanese vs. Stewart, 78 Misc. Rep. (N. Y.) 581,* and *Pensabene vs. Auditor Co., 78 Misc. 538.*

§ 20. Admiralty jurisdiction. New York City is the greatest seaport in America and more laborers are employed in New York State in connection with the operation of vessels and kindred work than in any other state in the Union. The Legislature has established three groups of employees engaged in this class of work, to which the compensation law has been made applicable. They are Group 8, relating to the operation of vessels; Group 9, relating to shipbuilding, including construction and repair; and Group 10, longshore work, including the loading or unloading of cargoes.

Group 8 excludes from the act the operation of vessels

[1] Gould's case, 215 Mass. 480.

[2] Kennerson vs. Thames Towboat Co., 94 Atl. Rep. Conn. 372.

[3] Deeny vs. Wright & Cobb Lighterage Co., 86 N. J. Law J. 121. Rounsaville vs. Central R. R., 94 Atl. Rep. 892.

of other states or countries engaged in interstate commerce and the repair of such vessels when the work is performed by the owner. Compensation was denied by the Commission in File No. 259, *Coons vs. Kennedy Towing Line* and in Claim No. 47205, *Underwood vs. International Elevating Co.,* two cases in which residents of New York met their deaths while New Jersey vessels were being operated in the New York Harbor. New York State vessels are made subject to the act whether within or without the State, following the well-established doctrine that a vessel remains a part of the State from whence it hails no matter where it may be located[1] and the compensation law has been held to apply where the accident happened upon a New York vessel lying in one of the harbors of the State of New Jersey.[2]

Group 9 covers shipbuilding and repairing and includes the repair of foreign vessels where the work is carried on by New York concerns. An employee engaged in the repair of a vessel of a foreign state or country is within the compensation law if employed by a New York State firm but not when employed by the owner or charterer of the vessel.

Group 10 covers longshore work, including loading and unloading of ships and all manner of handling cargoes. By placing this employment in a separate group it is distinguished from the operation of vessels so that employees performing longshore work in relation to foreign vessels are brought within the act no matter by whom employed.[3]

In creating these three groups the Legislature has entered a field covered to a large extent by the Maritime Law and has brought the act in conflict with the jurisdiction of the Courts of Admiralty, as will be more fully explained in the next section.

§ 21. Admiralty jurisdiction—Optional remedy of employees. The rule is well established under Federal

[1] McDonald vs. Mallory, 77 N. Y. 546.

Manning vs. International Marine Co., 212 Fed. Rep. 933.

[2] Matter of Edwardson vs. Jarvis Lighterage Co., 168 App. Div. 368; 158 N. Y. Supp. 391.

[3] Matter of Jensen vs. Southern Pacific Co., 215 N. Y. 514.

decisions that when an injury takes place upon navigable waters of the United States, it is within the Admiralty jurisdiction of the Federal Courts.[1] In the State of Washington it has been decided that the compensation act has no application to employees who may bring a proceeding in Admiralty.[2] In New York, however, it was held by the Court of Appeals in the *Matter of Walker vs. Clyde Steamship Co., 215 N. Y. 529,* that employers of this class are subjected to two remedies, one under the compensation act and the other through a suit in Admiralty. In this decision, it was pointed out that prior to the enactment of the compensation law a suitor might pursue his remedy in Admiralty or might resort to his common law remedy by suit in either State or Federal Court. It was recognized that the State could not interfere with the Admiralty jurisdiction, citing as authorities, *The Lottawanna, 21 Wall 558,* and *Workman vs. New York City, 179 U. S. 552,* and the effect of the decision is to give employees who may be injured on a vessel the option of either taking compensation or instituting a proceeding in Admiralty to recover damages. The nature of the work is immaterial. Whether the employee is injured while engaged in the operation of a New York vessel under Group 8, in the construction or repair of a vessel under Group 9, or in longshore work under Group 10, if the accident happens on a vessel while lying in navigable waters of the United States, whether under navigation or moored to a dock, the injured has an option of remedies. This rule effects the whole shipping industry and all transportation by water in the New York Harbor, in the Great Lakes and upon the Hudson River and follows New York vessels upon the high seas or in foreign waters.

An injury which happens on land is not subject to Admiralty jurisdiction and a longshoreman, while working on shore is entirely within the compensation act, but when he steps on the vessel in the discharge of the same work he has an option of remedies. This subject is

[1] Atlantic Transport Co. vs. Imbrovek, 234 U. S. 52.

[2] State Ex Reel Jarvis vs. Daggett, 151 Pac. Rep. 648.

now before the United States Supreme Court in several cases. If the decision in the State of Washington is followed the compensation law will have no application where the accident happens on a vessel, but if the decision of the New York Court of Appeals is followed, the employee injured on a vessel will retain an option as to his remedies.

§ 22. The Federal Employers' Liability Act.—Railroad employees. A law was passed by Congress, April 22, 1908, which is known as the Federal Employers' Liability Act. It relates to common carriers by railroads engaged in interstate commerce and makes such common carriers liable for injuries due to negligence and to defects in railroad ways, machinery, appliances, etc. Having this Federal law in mind, the Legislature inserted Section 114 in the compensation law. This section provides:

> "The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce," * * *

and there follows a provision under which employers and employees engaged in interstate commerce may elect to come within the Act.

It is apparent that this section is awkwardly phrased and this was recognized by the Court of Appeals in *Matter of Jensen vs. Southern Pacific Co.* (Sec. 1, infra). In the Jensen case, it was held that the Legislature did not intend to confine the act to intrastate work alone, but also to interstate work, except as to injuries for which "a rule of liability or method of compensation has been or shall be established by the Congress of the United States." It was held that the words "may be" should be construed in the same sense as "shall be." In the Jensen case the Court had the section under consider-

ation in connection with common carriers by vessels and it was decided that the Federal Employers' Liability Act had no application to transportation by steamship companies. The application of the compensation law to employees of railroads engaged in interstate commerce was under consideration by the Court of Appeals in *Matter of Winfield vs. New York Central R. R. Co., 216 N. Y. 284.* It was pointed out that the Federal Employers' Liability Act is confined to injuries resulting from negligence while the scope of the compensation law is broader, because under its provisions the employee is awarded compensation for injuries whether they result from negligence or not; and in conclusion, the Court of Appeals decided:

> "In so far as employers and employees working in this State who are engaged in interstate commerce and injuries result to employees which are not the result of negligence and are not occasioned by the wilful intention of the employee to bring about the injury or death of himself or another, or result from his intoxication while on duty, Congress, not having legislated upon the subject, the State statute is operative."

Under this decision, compensation is payable to employees of railroads engaged in interstate commerce not only when the injury is received while the employee is employed in intrastate work, but also while engaged in interstate work unless caused by the negligence of his employer. A similar ruling has been made in the State of New Jersey,[1] but contrary rulings have been made under the compensation law in the State of California[2] and in the State of Illinois.[3] As the decisions by the State courts are conflicting, the question will not be definitely determined until passed upon by the United States Supreme Court, which now has under consideration the Winfield case construing the New York Act.

Whatever the final outcome of the conflict between the

[1] Matter of Rounsaville vs. Central R. R., 94 Atl. Rep. 892.

[2] Smith vs. Industrial Accident Commission, 147 Pac. Rep. 600.

[3] Staley vs. Ill. Central R. R. Co., 109 N. E. 342.

Federal Act and the compensation statutes, the question as to what constitutes interstate commerce and what facts justify a recovery under the Federal Act will always be of much interest to railroad employees and to the legal profession generally. The most recent important decision of the Supreme Court of the United States is the case of *Shanks vs. Del., Lack. & Western R. R. Co.,* decided January, 1916, 36 Sup. Ct. R. 188, affirming the New York Court of Appeals, (214 N. Y. 413). It was there held that an employee in a machine shop operated to repair locomotives used in both intrastate and interstate transportation is not employed in interstate commerce while engaged in taking down and putting into a new location in the shop a countershaft through which power is communicated to machinery used in the repair work. It was accordingly held that no recovery could be had under the Federal Act.

The leading cases in the Supreme Court of the United States in which it has been held that the employment was in interstate commerce within the meaning of the Federal Employers' Liability Act are the following: where a car repairer is replacing a drawbar in a car then in use in interstate commerce;[4] where a fireman is walking ahead of a locomotive and piloting the same through switches for the purpose of attaching the locomotive to an interstate train;[5] where a workman is injured while carrying bolts from a tool car to a bridge regularly used in the transportation of interstate trains; for repair work on the bridge;[6] where a clerk is walking through a railroad yard to meet an interstate train for the purpose of marking cars for the switch crew;[7] where a fireman, after preparing an engine to take out a train in interstate commerce is walking across adjacent tracks on an errand in connection with his work;[8] where a brakeman on a train made up of interstate and intrastate cars is assist-

[4] Second Employers' Liability Cases, 223 U. S. 1.

[5] Norfolk & West. R. R. vs. Earnest, 229 U. S. 114.

[6] Pederson vs. D. L. & W. R. R., 229 U. S. 146.

[7] St. Louis S. F. & T. R. R. vs. Seale, 229 U. S. 156.

[8] No. Carolina R. R. vs. Zachary, 232 U. S. 248.

ing in placing the latter on a side track so that the train may proceed with the interstate cars.[9]

In addition to the Shanks case above mentioned, the leading cases in which it was held that the requisite employments in interstate commerce did not exist are: where a member of a switching crew is engaged in handling a train of cars all of which were loaded with intrastate freight;[10] where an employee is injured in a coal mine operated by a railroad company, mining coal intended to be used in the company's locomotive transporting interstate commerce.[11]

An interesting line of cases are those in which the injured workman was employed about instrumentalities which had not as yet, or had entirely ceased to be used in interstate commerce, in all of which it was held that the Federal Employers' Liability Act did not apply.[12] These cases follow the reasoning of the Supreme Court in the Pederson case, in which the Court said it was not concerned with the construction of tracks, bridges, engines or cars which had not as yet been used in interstate commerce.

Distinctions between interstate and intrastate work are sometimes finely drawn. Generally speaking, however, a railroad employee is within the protection of the Federal Act if his work is in connection with the right of way over which interstate commerce is transported, such as the roadbed or a bridge, or in connection with locomotive or cars while drawing interstate commerce, or while temporarily withdrawn from the service for repairs. On the contrary, as was decided by the New York Appellate Division, Third Department, in the *Matter of Parsons vs. Delaware & Hudson R. R. Co., 167 App. Div. 536; 153 N. Y. Supp. 179,* the railroad employee is not within the Act while working on a locomotive or car which has been entirely withdrawn from

[9] N. Y. C. & H. R. R. R. vs. Carr, 238 U. S. 260.

[10] Illinois Central R. R. vs. Behrens, 233 U. S. 473.

[11] D. L. & W. R. R. vs. Yurkonis, 238 U. S. 439.

[12] Bravis vs. C. M. & St. P. R. R. Co., 217 Fed. Rep. 234.

Jackson vs. C. M. & St. P. R. R. Co., 210 Fed. Rep. 495.

Thomas vs. B. & M. R. R. Co., 218 Fed. Rep. 143.

use and for the time being is dismantled; and he is not under the Federal act while working upon indirect or remote appliances of interstate commerce, nor while engaged entirely in connection with intrastate work.

As stated by the Court of Appeals in the case of *Barlow vs. Lehigh Valley R. R. Co. 214 N. Y. 116,* referring to railroad employees:

> "It is an anomalous situation and one to be remedied as far as possible by legislation, that an employer's liability to his employee may be governed by one rule at one moment and by an entirely different rule at the next, though the employee is all the time engaged in precisely the same kind of work."

The ordinary street surface railroad operated in a city or village is not a common carrier by railroad within the meaning of the Federal Act.[13] An interurban electric railroad which carries passengers, freight, express or mail, is, however, considered as a common carrier by railroad,[14] and employees of such electric roads are within the protection of the Federal Act if employed in interstate commerce.

A railroad which extends across a state line is sometimes engaged in intrastate work and roads entirely within the State of New York are engaged in interstate commerce when transporting freight destined to or received from another state.

A railroad employee has no remedy except compensation when injured while at intrastate work, and under the Winfield case, when injured while working in connection with interstate commerce, he may sue for any injury due to negligence and have compensation when negligence is absent.

§ 23. Independent contractors. An independent contractor is defined as a person who is exercising an independent employment and agrees to perform work according to his own method without subjecting himself

[13] U. S. vs. Balt. & Ohio S. W. R. R. Co., 226 U. S. 14.

[14] Omaha & Council Bluffs vs. Int. St. Commerce Commission, 230 U. S. 324, 336, 337.

Kansas City West. R. R. Co. vs. McAdow, 164 S. W. 188, affirmed by the U. S. Supreme Court, January 8, 1916. (240 U. S. 51.)

to the control of his employer except as to the result of his work. The circumstances which indicate a relationship to be that of an independent contractor are:

1. The independent nature of the business.
2. The contract to perform a specific piece of work.
3. The contract for a set price.
4. The employment of assistants.
5. The furnishing of materials.
6. The control of the work except as to the result.

Taken separately, these elements are not conclusive but when all are present the relationship is that of an independent contractor. Each case must be decided according to the facts which exist but the control over the work is the most important element. In the case of *Rheinwald vs. Builders Brick & Supply Co.* (Sec. 2 infra) the injured workman had a written contract to paint a sign under which he guaranteed the work. He employed no assistants and met his death from an injury which he received in falling from a ladder while doing the work. The Workmen's Compensation Commission by divided vote, held that the deceased workman was an independent contractor and denied the widow's claim for compensation. This decision was reversed in the Appellate Division by a divided Court where it was held that Rheinwald was a workman and entitled to the benefits of the compensation act. An award of compensation has since been made and the case will eventually be passed upon by the Court of Appeals.

In *Matter of Powley vs. Vivian & Co., 169 App. Div. 170; 154 N. Y. Supp. 426,* the injured workman had leased a dredge to his employer under written contract by the terms of which he retained charge over its operation and over the members of the crew who were employees of the lessee. It was held that the claimant was exercising an independent calling and that as to the operation of the dredge he was not an employee. An award of compensation was upheld, however, because the claimant at the time of the accident was engaged in the operation of a launch transporting supplies to the dredge—work which should have been performed by his employer.

It is evident from this decision that an independent contractor may also at times be regarded as an employee. In case of doubt as to whether the workman is an independent contractor, compensation insurance should be provided for should it develop that the workman was within the protection of the compensation law, he could, in case of injury, sue for damages, in which event the employer would be deprived of the defenses of contributory negligence, assumed risk and negligence of fellow servants.

Although one may be doing the work of an independent contractor and be barred from the benefits of the compensation law, the person for whom he is working is still under the obligation to exercise diligence and care to the end that the independent contractor may not receive injury while in the course of his employment. In the Bargey case (Sec. 11), the deceased workman had just completed an independent contract for repairs upon the building in which the accident happened and at the time of the injury was working by the day. While engaged upon the work, the floor of the employers premises crashed down upon his head, killing him instantly, and, under these circumstances, it would be immaterial whether he was an independent contractor or a casual employee, for in either event the owner of the building would be liable in damages if the injury was due to his negligence.

§ 24. Employees injured through the negligence of third persons.[1] If a workman entitled to compensation is injured or killed by the negligence of another not in the same employ, he must, or in case of death his dependents, must elect whether to take compensation or pursue his remedy against the third party through whose negligence the injury was occasioned. Rule 51 was adopted by the Commission to regulate the manner in which such election shall be made. Under this rule, if the injured workman elects to take compensation, such election is made by filing a claim for compensation with the Commission containing an assignment of the cause

[1] Section 29 Workmen's Compensation Law.

of action against such third party to the person liable for the payment of compensation.

In an action brought against a third party by the employer or insurance carrier, upon the assignment of the cause of action made by the injured workman, the recovery is limited to the amount of compensation paid the injured workman by the party bringing the suit.[2] In England it has been held that the legitimate costs and expenses of the compensation proceedings may be recovered in addition to the compensation paid,[3] and, doubtless, this rule would also be applied under the New York act. The defendant in such an action may set up the usual defenses in negligence cases including the contributory negligence of the employee and may also show that the compensation was not paid in accordance with the statute.[4]

Where the injured workman or his dependents elect to sue a third party, the employer or insurance carrier is only liable in compensation for the deficiency between the amount recovered against the third party and the compensation provided by the act. Under the rules of the Commission where compensation is to be claimed for a possible deficiency a notice of election to sue the third party must be filed with the Commission together with a claim for compensation, which is held in abeyance by the Commission until the suit is determined. It was decided, however, in the case of *Lester vs. Otis Elevator Co., 169 App. Div. 613; 153 N. Y. Supp. 1058,* that the injured workman may maintain a suit against the third party to recover damages at common law without filing a notice of election with the Commission. The rules of the Commission, therefore, only apply where claim for compensation is to be made for the deficiency between the amount recovered in the suit and the amount of compensation provided by the act. In England it has been held that suit for damages may be brought against a fellow employee[5] but such suit cannot be brought under

[2] U. S. Fidelity & Guaranty Co. vs. New York Railways Co., Supreme Court App. Term, Jan., 1916; 156 N. Y. Supp. 615.

[3] Great Northern R. R. Co. vs. Whitehead, 4 B. W. C. C. 89.

[4] Thompson vs. N. E. M. Co., 5 W. C. C. 71.

the New York act as the injured workman only has this election of remedies where the injury was caused by a person "not in the same employ."

Most of the compensation statutes have a provision in relation to injuries of this character similar to the provisions of Section 29 of the New York act. In the state of Washington the optional remedy of the employee is confined to injuries received "away from the plant" and in the case of *Northern Pacific Railway Co. vs. Mary A. Meese,*[6] it was decided that the compensation law was the only remedy for an injury received at the plant although it was caused by the negligence of a third party.

If compensation is claimed in addition to the amount recovered from the third party, a compromise of the suit brought by the workman or his dependents at an amount less than the compensation provided b ythe act cannot be made except with the written approval of the Commission if the deficiency of compensation is payable from the State Fund, and otherwise with the written approval of the person, association or corporation liable to pay the same. This provision of the act does not, however, prevent a compromise if the workman or his dependents make no claim for compensation in addition to the amount of the settlement. In a case where the injury was due to a collision between a trolley car and a wagon at a street crossing in which the driver of the wagon signed a release exonerating the railroad company, it was held that such a release did not bar the claim for compensation made by the injured workman, and that the release would not prevent the insurance carrier from prosecuting the assigned claim of the injured workman against the third party.[7] An infant, *sui juris* may sue a third party under Section 29 without the appointment of a guardian *Ad Litem.*[8]

Since the rules of procedure were adopted by the Commission for proceedings in cases of this character, the

[5] Smith Dock Co. vs. Readhead, 5 B. W. C. C. 449.

[6] 239 U. S. 614; 206 Fed. 222; 211 Fed. 254.

[7] Matter of Woodward vs. E. W. Conklin & Sons, App. Div. Third Dept. March 8, 1916; 157 N. Y. Supp. 948.

[8] Herkey vs. Agar Mfg. Co., 158 N. Y. Supp. 869; 90 Misc. 457.

compensation law was amended, requiring that the claim for compensation should first be presented to the employer. Because of this amendment the notice of election to sue a third party and the claim for compensation for deficiency should be filed with the employer as well as with the Commission.

PART II.

COMPENSATION AND LIABILITY INSURANCE.

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SEC. 25. SECURITY FOR PAYMENT OF COMPENSATION.
" 26. SELF-INSURANCE.
" 27. INSURANCE BY STOCK COMPANIES AND MUTUAL ASSOCIATIONS.
" 28. THE STATE INSURANCE FUND—COVERAGE.
" 29. STATE INSURANCE FUND—RELEASE FROM PAYMENT OF COMPENSATION.
" 30. STATE INSURANCE FUND—IMMUNITY.
" 31. ADMINISTRATION OF THE STATE INSURANCE FUND.

§ 25. Security for payment of compensation. Every employer subject to the compensation law is required, under the provisions of Section 50 to give security for the payment of compensation. This security may be given by insuring with the State Insurance Fund, with a stock corporation or a mutual association authorized to write workmen's compensation insurance, or by furnishing satisfactory proof to the Commission of financial ability to pay compensation directly without insuring. The State Fund, stock companies, mutual associations and self-insurers are defined as "insurance carriers." (Sec. 3, subd. 12.) Every insurance policy issued by a stock or mutual company to insure an employer against liability to his employees must also cover liability to pay compensation (Sec. 54, subd. 4) and the injured workman may have recourse to the policy,

through the Commission, to enforce payment of compensation. (Sec. 54, subd. 1.) Failure to give security for the payment of compensation makes the employer liable to a penalty in a sum equal to the premium payable to the State Fund and enables the injured workman or his dependents to sue for damages.

Under Section 50 the method by which the employer shall give security for compensation is purely optional. In some of the decisions a different rule has been laid down from which it might appear that the compensation act was intended to establish a system of state insurance. In the case, *Matter of McQueeney vs. Sutphen & Meyer, 167 App. Div. 528; 153 N. Y. Supp. 554,* it was first intimated that the law should be construed on the theory that it contemplates insurance in the State Fund. The Court had under consideration the presumptions created in favor of the injured workman by Section 21 of the act. The point at issue in the case was whether the employee was injured while engaged in a hazardous occupation. The employer's business consisted of the sale of plate glass and also the manufacture of glass products. The Court said that as against the State Fund the injury would be assumed to be within the law unless otherwise shown and that where an employee is engaged in an employment declared hazardous, but at times works in a non-hazardous employment, the injury must be considered within the act if the employer fails to show all of the facts. It was held that employers who are self-insurers or who insure otherwise than in the State Fund, should be governed by the same rule and the award as made by the Commission against the employer and the insurance company was affirmed.

In another case, *Matter of Winfield vs. New York Central R. R. Co., 168 App. Div. 351; 153 N. Y. Supp. 499,* in which the Court has under consideration the application of the statute to railroad employees, it was stated that "the Legislature evidently intended to take care of the workman through a state system of insurance." In arriving at this conclusion, the Court evidently overlooked the provisions of Section 25 of the act

relating to the payment of compensation. In one portion of the opinion, the Court said, "The State Insurance Fund makes the compensation to the injured employee," and in another place, "The self-insurer, the company or the association pays the losses to the Fund. The Fund, in all cases, through the Commission, makes the compensation to the employee." As a matter of fact, Section 25, at the time this decision was rendered, required payment of compensation, except where the employer was insured in the State Fund, directly to the Commission and the Commission was authorized to disburse the same to the injured workman. The same section also authorized the Commission to require from employers and insurance companies deposits with the Commission for the purpose of paying compensation therefrom. This method was strictly followed by the Commission until Section 25 was amended by Chapter 167 of the Laws of 1915, since which time compensation is paid directly by the employer. As the law now stands, the obligation is on the employer to pay the compensation in the first instance and he is reimbursed by the insurance carrier whether it be the State Fund or an insurance company. In practice, payments are usually made directly by the insurance carrier. The only reference to the State Fund in connection with awards against self-insurers and insurance companies is contained in Section 27, under which, if the nature of the injury makes it possible to compute the present value of future payments with due regard for life contingencies, the Commission may, in its discretion, require the employer or insurance carrier to pay into the State Fund an amount equal to the present value of the unpaid installments of compensation. Such payments, however, are made in trust and the Fund thus created is separate and apart from the State Insurance Fund consisting of premiums paid by employers. So far the provisions of Section 27 have not been resorted to by the Commission and no trust fund has been created.

The effect of the different forms of insurance and the protection which the employer receives against other forms of liability is treated in the sections which follow.

§ 26. **Self-insurance.** Where the employer furnishes satisfactory proof to the Commission of financial ability to pay compensation without insuring, the Commission requires a deposit of securities of the kind prescribed in Section 13 of the Insurance Law. The amount of securities has been fixed by the Commission in a sum equal to the premium which the employer would pay to the State Fund for a period of six months, with the minimum of $5,000. This class of employers are known as self-insurers and are included within the term "insurance carrier." Commencing July 1, 1916, and annually thereafter they will be required to pay a proportionate share of the expense incurred by the State in the administration of the workmen's compensation law. The employer who gives security for the payment of compensation by becoming a self-insurer, assumes the entire responsibility for the payment of compensation. He may, however, guard against catastrophe losses by reinsurance. Compensation is paid directly to employees by self-insurers except where the future installments are commuted into one lump sum and paid to the State Fund in trust, in which event self-insurers become relieved from further liability. About 250 employers have become self-insurers under the New York law. They include nearly all the large railroad corporations and many of the largest industries of the state.

§ 27. **Insurance by Stock Companies and Mutual Associations.** Insurance with a stock company or a mutual association not only protects the employer against the payment of compensation but against all other forms of liability for injuries received by employees. This protection is afforded through a standard form of insurance policy which covers employees, whether subject to the compensation act or outside of its provisions. An exception is the liability for damages for an injury received by a person employed contrary to the provisions of the Labor Law. Where a minor is employed in violation of Section 70 of the Labor Law, women and children in violation of Section 93 or Section 131, and an injury is received, the fact that the injured workman

was employed in violation of the provisions of one of these sections establishes a *prima facie* case of negligence.[1] The owner of a building is also held liable where he fails to provide fire escapes as required by the Labor Law.[2] If an employee injured under these conditions is engaged in a hazardous employment and is within the compensation act, the stock or mutual company must pay the compensation; but where the case is outside the act and damages are recovered for negligence, the policy of insurance does not protect the employer.[3]

The standard form of workmen's compensation and liability insurance policy does not protect the employer against public liability. If he desires to be indemnified against liability to the public, he must take additional insurance.

Mutual Associations are incorporated under Article 5a of the Insurance Law (Chapter 832, Laws of 1913) with authority to carry on the business of insurance on the mutual plan. While the mutual companies were principally intended to insure the payment of compensation, they insure against liability to employees generally and are authorized to insure against liability to the public. Under the mutual plan, the employer is charged the same rate of insurance as with a stock company. Should there be a surplus after the payment of losses and the setting up of the necessary reserves, the mutual association may declare a dividend, subject to the approval of the Insurance Department. If the premiums are not sufficient to pay the losses and establish the necessary reserves, employers, who are members of the association, may be assessed to make up the deficiency.

The experience of the past fifty years, in connection with mutual insurance, has shown that in practice, it is sometimes deceptive and unsound. The transaction of the business of insurance, in order to make the contract absolutely secure, involves the creation of surplus funds

[1] Gallenkamp vs. Garvin Co., 179 N. Y. 588.
Marino vs. Lehmier, 173 N. Y. 530.
Koaster vs. Rochester Candy Co., 194 N. Y. 92.

[2] Goetz vs. Duffy, 215 N. Y. 53.

[3] Mason-Henry Press vs. Aetna Life Ins. Co., 211 N. Y. 489.
Holland Laundry vs. Travellers Ins. Co., 166 App. Div. 621.

to provide against unforeseen contingencies and in this respect the stock companies are superior to mutual associations. The object of the mutual association is to secure compensation and liability insurance at cost. It is supposed to bring the employers together with the result that co-operation is secured, to the end that better conditions of safety may be provided for employees. There is always the possibility of assessment in case the association has insufficient funds to meet its losses and the employer does not know the exact extent of his liability. In the case of a stock company there is no assessment or liability beyond the premium paid on the part of the policyholder, because, in addition to the reserve set up, the company also provides the safeguard of its capital and surplus.

As the mutual associations do not pay any commissions to agents, the cost of operating is low. Each member of the association acts, to some extent, as an agent in soliciting new members, but as this is outside of the employer's regular business, it is not always of any advantage either to the employer or to the association. Mutual associations in the State of New York, transacting workmen's compensation insurance, have been in existence less than two years and in cases where the premium income is sufficiently large to make the expense ratio small, some of them have made an apparent success. Nearly all the mutual insurance companies in the State were permitted to declare a dividend of 20 per cent. after their first year.

One of the advantages of the stock company over the mutual association rises from the fact, as stated above, that the stock company assumes the entire liability while with the mutual association, the employer has the possibility of an assessment to make good deficiencies in case of catastrophe or other unanticipated losses. The stock company absolutely relieves the insured from all responsibility while in the case of the mutual association, the assured is not only operating his own industry but is also engaged in the insurance business, a combination which sometimes does not work out satisfactorily in prac-

tice. A stock company has back of it the experience under employers' liability insurance and has been taught the necessity for accumulating an ample reserve and surplus. By operating on a large scale, it is enabled to obtain a satisfactory average of losses. At the present time, stock companies are transacting over three-quarters of the entire workmen's compensation business.

The employer is not relieved from liability under either the stock or mutual plan until the compensation has been paid by the insurance company. In this respect stock or mutual insurance differs from insurance with the State Fund, where the only recourse of the injured workman is against the fund itself and the employer is under no liability to pay compensation. However, it will be understood that the State Insurance Fund gives no insurance against employers' liability, but merely covers workmen's compensation. Both stock and mutual companies guard against catastrophe losses, with reinsurance or by providing special reserves.

The obligation of the employer to pay for medical treatment for 60 days after the injury is covered by the State Fund and by stock corporations and mutual associations alike, and if the employer desires to assume this obligation himself a discount of 20 per cent. is given on the premiums.

§ 28. The State Insurance Fund—Coverage. The State Insurance Fund is established by Article 5 of the Workmen's Compensation Law. Insurance with the State Fund only protects the employer against the payment of compensation. This is made obvious by referring to Section 90 of the act under which the State Fund is created "for the purpose of insuring employers against liability under this chapter and of assuring to the persons entitled thereto the compensation provided by this chapter," and from the standard form of policy issued by the State Insurance Fund which insures "against liability under Chapter 816 of the Laws of 1913, known as the workmen's compensation act and under any amendments thereof, heretofore or thereafter adopted."

INCOMPLETE PROTECTION BY STATE INSURANCE FUND.

There has been pointed out in Part I of this work many instances where the employer is liable in a suit for damages entirely apart from workmen's compensation. Many employers find themselves with some employees who are subject to the act, some not subject thereto, and others doubtful. In some cases the compensation law fails to provide for the employment and in other cases it fails to provide compensation or death benefits for the injury. Liability still exists in all of these cases, sometimes under the common law and sometimes under Employers' Liability Acts. There is also liability in Admiralty as to the operation of vessels, and under the Federal Employers' Liability Act, where the employer is doing the business of a common carrier by railroad and transporting or handling interstate commerce. As to all of the forms of liability described in the first part of this work, aside from compensation, the State Insurance Fund gives no protection to the employer.

The limited application of the compensation act and the need of combination insurance to fully protect an employer is one of the most serious objections against state compensation insurance. To meet this objection, a resolution was adopted by the Commission when the law first went into operation, reciting that all employees, where a hazardous employment is being conducted, would be considered within the meaning of the Act, and would be held by the Commission to come within its provisions. This resolution has no legal effect. In the case of *Tomassi vs. Christensen, 171 App. Div. 284; 156 N. Y. Supp. 905, decided January, 1916,* the Court held that "it was the duty of the Legislature and not of the Commission or of this Court to determine what employments are hazardous," and in the *Matter of DeVoe vs. New York State Railways, 169 App. Div. 472; 155 N. Y. Supp. 12,* the Court held that the statute "is not to be extended by implication to accidents not clearly within the language of the Act." The Commission can only exercise such powers as are conferred by statute

and while the Commission is given wide latitude in determining claims for compensation, it cannot extend the benefits of the Act to employments which are not within its provisions nor to employees who are not entitled to its benefits. Like any other administrative body, the Commission must rely upon the construction of the law as laid down by the Courts.

The State Fund covers payment of compensation to all employees whether legally employed or not and compensation is paid by the State Fund, although the injury is due to a violation of the Labor Law. The State is, therefore, through one department, placed in the anomalous position of prosecuting employers for violations of the Labor Law and at the same time protecting them against suits and the payment of compensation for injuries due to such violations.

The elective provisions of the Act, added to Section 2 by the Amendments of 1916, if taken advantage of by employers and employees, will bring all employees within the act without regard to the work carried on by the employer or the duties of the employee, and to this extent will permit the State Insurance Fund to give better protection to the employer than formerly.

§ 29. State Insurance Fund—Release from payment of compensation. The State Insurance Fund was created to provide the industries of the State with insurance at the lowest cost consistent with political management of business affairs and to provide a safe method of assuring to injured workmen compensation for industrial injuries. The rates of insurance for the State Fund are determined by the Commission and operate as a check upon the rates charged by stock and mutual companies, which are under no limit except that a minimum has been established by the Insurance Department below which stock and mutual companies are not permitted to accept insurance risks.

The chief advantage which the employer secures by insuring in the State Fund is the release from liability to pay compensation. This release from liability is afforded by Section 53 of the Act under the terms of which a per-

son entitled to compensation for personal injuries has recourse only to the State Fund. The same section provides that an employer who does not contribute premiums to the State Fund shall not be relieved from liability to pay compensation except by payment thereof by himself or his insurance carrier. The experience under the State Insurance Fund in New York State has so far only embraced a period of eighteen months. The history of State insurance in some of the other states demonstrates that at times need will exist for additional funds because of unexpected losses and depleted surplus. There is always danger of a catastrophe which might impose a heavy burden upon the State Fund and no provision is made for reinsurance to protect against such catastrophe losses.

Although Section 53 releases the employer from liability to pay compensation, a different question will be presented if the Fund becomes unable to meet the claims of injured workmen. There is no provision in the Act authorizing assessment against employers except that contained in Section 100 relating to employers who withdraw from the Fund and which provides that the employers' liability to assessment shall continue for one year after the date of withdrawal as against all liabilities accruing prior to that time.

STATE INSURANCE FUND'S RATES MAY BE READJUSTED, INCREASING EMPLOYERS' CHARGES.

The attorney-general, in an opinion dated July 16, 1915, ruled that Section 100 does not authorize the Commission to levy assessments against employers who have paid the premiums required by the statute. The attorney-general, however, overlooked the power of the Commission to readjust rates and an examination of the powers and duties of the Commission in this respect would seem to indicate that employers who remain in the Fund must pay a rate of insurance sufficient to pay all losses. Under any other construction of the statute the solvency of the Fund would depend entirely upon the ability of the Commission to establish rates in the first

instance sufficiently large to guard against any financial disaster. Section 95 requires the Commission to fix the rates of premiums in such a manner as to create a solvent fund and a sufficient surplus and reserve. The established rates may be modified by the Commission at the end of each policy period of six months. As the rates must produce a premium income sufficient to keep the fund solvent, the Commission, in making a readjustment at the end of each six months, must take into consideration the losses which have accrued as well as those which are anticipated. If the surplus and reserve be depleted, the premiums must be increased until the State Fund is again placed upon a proper financial basis.

STATE NOT FINANCIALLY RESPONSIBLE FOR OBLIGATIONS OF STATE INSURANCE.

The suggestion that the State is under obligation to make up any deficiency in the Fund has neither legal nor moral foundation. Section 90 of the Act provides that the fund "shall be administered by the Commission without liability on the part of the State beyond the amount of such fund." Employers are, therefore, warned by the Act itself, that the Fund is administered without liability on the part of the State and any act of the Legislature appropriating funds for deficiencies in State insurance would not only violate Section 90 of the compensation law, but would constitute the taking of property without due process of law in violation of the State constitution.

EMPLOYERS' LIABILITY TO ASSESSMENTS UNDER STATE INSURANCE FUND.

The opinion of the attorney-general is entitled to great respect but upon an academic question of this character it has no legal effect. At best it would seem to apply only to employers who withdraw from the Fund by giving notice within thirty days as provided by Section 100. Failure to give such notice continues the policy and the employer is required to pay the premium

within two weeks after notice of the rate and amount thereof. It does not appear equitable to permit the Commission to assess upon the employers who remain in the Fund by adjustment of rates, a sum sufficient to make up deficiencies; and whether employers who withdraw can be compelled to contribute to such deficiencies will remain unsettled until the question is determined by the Courts.

Viewing the provisions from a practical standpoint and having in mind the purpose of assuring compensation to injured workmen and their dependents, the State Insurance Fund will doubtless be construed by the Courts as a State mutual. The employer obtains a release from the payment of individual claims for compensation but no further release. Employers as a whole must contribute premiums sufficient to keep the Fund solvent and carry out its beneficient purpose.

§ 30. **State Insurance Fund—Immunity.** When the workmen's compensation law first became effective no claim was made that an employer contributing premiums to the State Insurance Fund secured any release from liability under Section 53 of the act, except the release from the payment of compensation. It was then announced that "the State Fund policy gives complete protection under the workmen's compensation act, and the liability of a successful suit at common law by injured workmen is so exceedingly remote as to be practically negligible." From time to time various forms of liability outside the compensation act became apparent from judicial decisions. While the State Fund still admits that its policy only covers the payment of compensation, it now contends that where an employer insures in the State Fund, the injured employee would be deprived of any right of action to recover damages, although such damages could be recovered against a self-insurer or against an employer insured with a stock company or mutual association. Referring to the case of *Shinnick vs. Clover Farms Co.* (Sec. 13 infra), in which the Court held that damages may be recovered for disfigurement, the State Fund has announced in Vol. 3

of The Bulletin, published by the New York State Industrial Commission:

> "Had the insurance been carried by the State Fund, Section 53 would have furnished an apparently impregnable defense against the suit instituted by the employee. The language of this section is broad and sweeping, but also definite and explicit. It excludes not only injuries resulting in disability or compensatable injuries, but injuries within the meaning of the definition given in the act. * * * The fact that the insurance of the employer in this case was carried in a stock company deprived him of the special protection afforded by Section 53 of the act."

The section in question reads: (Sec. 53.) "An employer securing the payment of compensation by contributing premiums to the State Fund shall thereby become relieved from all liability for personal injuries or death sustained by his employees, and the person entitled to compensation under this chapter shall have recourse therefor only to the State Fund and not to the employer. An employer shall not otherwise be relieved from the liability for compensation prescribed by this chapter except by the payment thereof by himself or his insurance carrier."

When all of the provisions of this section are read together, it is obvious that no release is intended from any liability to pay damages outside of the compensation act. The phrase "and the persons entitled to compensation under this chapter shall have recourse therefor only to the State Fund" limits the preceding phrase "shall thereby become relieved from all liability for personal injuries or death sustained by his employees." The intention of the section is also made apparent when the last sentence is considered, under which the employer who does not contribute premiums to the State Fund is released, not from all liability, but "from the liability for compensation," upon payment thereof by himself or his insurance carrier. The release is from compensatable injuries. It is secured by State Fund employers be-

cause payment is assumed by the Fund itself and it is secured by other employers when the compensation has been paid to the injured workman.

To support its construction of Section 53, the State Fund relies upon a sentence taken from the opinion of the Court in *Matter of Crockett vs. State Insurance Fund, 170 App. Div. 122; 155 N. Y. Supp. 692,* which reads: "Section 53 of the workmen's compensation act gives absolute immunity to an employer after insurance in the state fund while no such immunity is given after insurance with any other carrier." In the Crockett case, however, the Court was merely deciding upon the right of an employer in the State Fund to appeal from a decision made by the Commission. The question of immunity was not before the Court and the above quotation from the opinion cannot be regarded as an authority upon the question. A somewhat similar statement, but one which more fully explains the purpose of Section 53 is found in *Matter of Post vs. Burger & Gohkle, 216 N. Y. 544,* viz.:

> "An employer securing payment of compensation by contributing premiums to the said fund is thereby relieved from all liability for personal injuries or death sustained by his employees *and a similar relief from liability* is obtained by the employer by payment of the compensation by himself or an insurance carrier (Sec. 53)."

The quotation from the decision in the Post case indicates that all employers are treated alike and disposes of the claim that the State Fund protects against suits to which employers may be otherwise subject. The State has not established one rule for employers in the State Fund and another rule for employers who give security for the payment of compensation by one of the other methods provided by the act, nor has the State power to make such discrimination. The liability mentioned in Section 53 is the liability to pay compensation and the release is a release from that liability alone. Where the compensation act applies the only remedy is the benefits prescribed, but where the act does not

apply, the liability of the employer, and the right of the injured workman to recover damages for personal injuries, remains the same as before the act was adopted.

Since the foregoing was written, a decision has been rendered by Supreme Court Justice William S. Andrews in the case of Michael Connors vs. Semet-Solvay Co. (not yet reported) in which it is expressly decided that there is no distinction in the release from liability as between employers who insure in the State Fund and employers who are self-insurers or insure with a stock or mutual company. After quoting Section 53, Judge Andrews states:

> "It is not possible that a distinction, without reason, is here sought to be made between one who insures in the State Fund and others who insure as the statute equally permits. The purpose of insurance is to secure a fund which will protect the servant. In either case this is equally accomplished. There is no purpose to be served in holding the servant may not recover for pain and suffering, if the state is the insurer, yet may do so if a corporation is the one liable. In fact, the Court of Appeals seems to have passed upon this question." (Quoting the above extract from Matter of Post.)

§ 31. **Administration of the State Insurance Fund.** The entire expense of the State Insurance Fund is paid by the State until July 1, 1916. Subsequent to that time the funds appropriated by the State for carrying on the fund will be restored to the State Treasury out of the premiums paid by employers. The State Fund will also at the same time commence to reimburse the State, together with all other insurance carriers, for its proportionate share of the expense of the Commission in connection with the examination, determination and payment of claims. Employers in the Fund during the first two years will have had the benefit of a considerable reduction in rates because the expenses have all been paid by the State. It is expected there will always be a reduction from the rates charged by the stock companies because the State Fund pays no commissions to agents.

Theoretically the Fund will be administered after July 1, 1916, in such manner that the employers will be called upon to contribute only such premiums as will pay compensation losses and administration expenses. In this respect the Fund will be similar to the compensation mutuals. But it is claimed by advocates of stock insurance that in neither of these classes of insurance does the employer obtain the additional security afforded by the large resources of the stock companies, including their capital and surplus.

As already seen, the decisions of the Commission are final upon questions of fact. They are also final upon questions of law as to employers in the State Fund. This was decided in *Matter of Crockett vs. State Insurance Fund, 170 App. Div. 122; 155 N. Y. Supp. 692,* where the Court held that an employer carrying compensation insurance in the State Fund could not appeal from a decision of the Commission. In this case compensation was awarded to Elizabeth K. Crockett, as widow of Davie M. Crockett, who died as a result of injuries received while in the employ of the International Railway Company of Buffalo, N. Y. The award was opposed by the employer because the claimant was united in marriage to the deceased subsequent to the date of the injury which later resulted in his death. It was contended that she was not a dependent at the time of the accident. The Commission decided that this was immaterial in view of the fact that Section 16 authorizes an award to the "surviving wife." When the case came before the Appellate Division, the appeal filed on behalf of the International Railway Company, was dismissed in an opinion written by Presiding Justice Smith. After reviewing the provisions of the act relating to appeals and pointing out that the Commission could not certify questions of law involved in decisions where the claim is made against the State Fund, the Court said:

> "It is true that the employer has a remote interest, even though insured in the State Fund, to the end that the risk which he claims not to be within the act may be so decided as affecting any subse-

quent premiums which he must pay. That interest, however, is too remote an interest to authorize his appeal in a matter where he is not otherwise aggrieved."

The injured workman claiming compensation against the State Fund is a party to the proceeding and is given the right of appeal by Section 23 of the act. Under the amendment of 1916, the Commission may now certify questions of law in State Insurance Fund cases, but the employer is still denied the right to appeal.

The International Railway Company, in support of its right to appeal in the Crockett case contended that it was directly interested in the award because it had been placed in an individual group. Under this individual grouping plan the company has returned the excess of its premium over losses and reserves, but is liable for no greater sum than the premium, the losses in excess thereof, if any, being made up out of the premiums contributed to the State Fund generally by other employers. The Attorney-General in an opinion dated January 28, 1916, decided that the individual grouping of employers in the State Fund, except under certain conditions, was illegal.

The provisions of the act relating to the administration of the State Fund confer very wide powers upon the Commission. The employer is bound by the decision of the Commission both upon the determination of rates and upon the determination of claims. This centralization of power in one body leads to a situation under which the compensation act may be administered in one manner as to employers in the State Fund and in a different manner as to those who give security for the payment of compensation by some other method.

An active competition for business is conducted between the State Insurance Fund on the one hand, and the stock and mutual insurance companies on the other. This situation was probably never contemplated by the framers of the act who regarded the State Fund more as a check upon the rates which might be charged by insurance companies and as a safe method of assuring com-

pensation to the injured employee. When carried to any considerable extent, this competition for business may lead to the acceptance of premiums upon employments to which the application of the law is doubtful, and may lead to a situation where awards will be made more to protect the employer from suit than in the interest of the injured workman and which would be denied except that such course might furnish an argument against State insurance.

The rule which governs the application of the compensation law to the industries of the State, is laid down by the Supreme Court in *Matter of Tomassi vs. Christensen, decided January, 1916, 171 App. Div. 284; 156 N. Y. Supp. 905,* wherein it is held to be the duty of the Legislature and not of the Commission or of the Court to determine what employments are hazardous. The Court said, "With reference to the act, an employment is either hazardous or non-hazardous and no employment can be treated as hazardous unless the act, fairly construed, declares it such. We cannot give to the language employed a strained or unusual meaning for the purpose of bringing within the act an employment not intended by the Legislature to be embraced within it." The Court passed upon the same question in *Matter of De La Gardelle vs. The Hampton Co., 167 App. Div. 617; 153 N. Y. Supp. 162,* and held that the category of occupations within the protection of the statute was not to be extended by judicial determination. It was there said:

> "Determination as to what employments shall be brought within the operation of the workmen's compensation law involves questions of fact and questions of policy which the Legislature and Governor must determine."

These decisions are binding upon the Commission and no award of compensation can be made simply because the employer has contributed premiums to the State Fund. The Commission is governed by the same rules no matter what the form of insurance. In *Matter of Post vs. Burger & Gohlke, 168 App. Div. 403; 153*

N. Y. Supp. 505, the Court said that the employer who insured otherwise than in the State Fund should have no advantage or disadvantage in the construction of the statute and that "the law contemplates equality and that all employees and employers shall be measured by the same rule without regard to the particular manner in which the insurance is carried." In the McQueeney case it was said that "it is the right of the individual employee and employer that they should be treated the same as other employees and employers within the act."

PART III

THE WORKMEN'S COMPENSATION LAW, ANNOTATED.
RULES ADOPTED UNDER THE COMPENSATION LAW.
INDEX OF HAZARDOUS EMPLOYMENTS.

PART III

WORKMEN'S COMPENSATION LAW, ANNOTATED.

(Chapter 816 of the Laws of 1913, as re-enacted and amended by Chapter 41 of the Laws of 1914, constituting Chapter 67 of the Consolidated Laws, as amended, including the amendments of 1916.)

ARTICLE 1.

SHORT TITLE; APPLICATION; DEFINITIONS.

Section 1. Short title.
2. Application.
3. Definitions.

§ 1. Short title. This chapter shall be known as the "workmen's compensation law."

In the case of *Jensen,* Matter of *vs. Southern Pacific Company,* 215 N. Y. 514, the Court of Appeals decided that the compensation law did not violate the 14th amendment of the Federal constitution.

§ 2. Application. Compensation provided for in the chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments:

The benefits of the compensation law are limited to the hazardous employments enumerated in this section and the list of employments cannot be enlarged either by the Commission or by the Courts.

De La Gardelle, Matter of *vs. Hampton Company,* 167 App. Div. 617; 153 N. Y. Supp. 162.

Tomassi, Matter of *vs. Christensen,* 171 App. Div. 284; 156 N. Y. Supp. 905.

In determining what employments are included within the 42 groups, the rule *ejusdem generis* will be applied

and general language will not be extended beyond the special language previously used.

Aylesworth, Matter of *vs. Phoenix Cheese Co.*, 170 App. App. Div. 34; 155 N. Y. Supp. 916.

Wilson, Matter of *vs. Dorflinger & Sons*, 218 N. Y. 84, (Court of Appeals, April 25, 1916.)

Group 1. The operation, including construction and repair, of railways operated by steam, electric or other motive power, street railways, and incline railways, but not their construction when constructed by any person other than the company which owns or operates the railway, including work of express, sleeping, parlor and dining car employees on railway trains.

Railroad employees engaged in intrastate work are included within Group 1.

Railroad employees engaged in interstate commerce are also included in Group 1 where the injury is not caused by the negligence of the employer.

Where the railroad employee is engaged in interstate commerce and the injury is due to negligence of the employer, the Federal Employers' Liability Act controls.

Winfield, Matter of *vs. N. Y. Central & Hud. River R. R.*, 168 App. Div. 351; 153 N. Y. Supp. 499; aff'd. 216 N. Y. 284.

An employee of a railroad who has finished operating his car for the day is not engaged in the operation of the railroad within the meaning of Group 1, while proceeding to have his watch tested.

De Voe, Matter of *vs. New York State Railways*, 169 App. Div. 472; 155 N. Y. Supp. 12.

Where a railroad employee is engaged to watch material adjoining the tracks and is killed while standing upon one of the tracks by a passing train, his widow is entitled to compensation.

Claim No. 31018, *White*, Matter of *vs. New York Central R. R. Co.*, 2. N. Y. St. Dep. Rep. 477; Aff. 216 N. Y. Memo. 653 (without opinion).

(See also Section 114 and cases cited.)

Group 2. Construction, repair and operation of railways not included in group one. (Group 2, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Group 3. The operation, including construction and repair, of car shops, machine shops, steam and power plants, and other works for the purposes of any such railway, or used or to be used in connection with it when operated, constructed or repaired by the company which owns or operates the railway.

A repair shop for the repair of engines and cars used both in interstate and intrastate commerce is not an instrumentality of interstate commerce.

Shanks vs. Delaware, Lackawanna & Western R. R. Co., 214 N. Y. 413; aff'd. 36 Sup. Ct. Rep. 188 (U. S.).

The above case was followed by the Commission in the Matter of *George Sauter vs. New York Central R. R. Co.*, in which an award of compensation was made October 20, 1915, for the loss of an arm due to an injury received while repairing windows in a car shop.

Group 4. The operation, including construction and repair of car shops, machine shops, steam and power plants, not included in group three.

Group 5. The operation, including construction and repair, of telephone lines and wires for the purposes of the business of a telephone company, or used or to be used in connection with its business, when constructed or operated by the company.

Group 6. The operation, including construction and repair, of telegraph lines and wires for the purposes of the business of a telegraph company, or used or to be used in connection with its business, when constructed or operated by the company.

Group 7. Construction or repair of telegraph and telephone lines not included in groups five and six. (Group 7, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Group 8. The operation, within or without the state, including repair, of vessels other than vessels of other states or countries used in interstate or foreign commerce, when operated or repaired by the company; marine wrecking. (Group 8, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Longshore work is not included within the operation of vessels.

Jensen, Matter of *vs. Southern Pacific Co.*, 215 N. Y. 514.

The captain of a "lighter" assisting in unloading his vessel in one of the harbors of the State of New Jersey is engaged in the operation of the vessel and is entitled to compensation under Group 8.

Edwardsen, Matter of *vs. Jarvis Lighterage Co.*, 168 App. Div. 368; 153 N. Y. Supp. 391.

A resident of New York State is not entitled to compensation for injuries received while engaged in the operation of a vessel of another state.

File No. 259, *Coons*, Matter of *vs. Kennedy Towing Co.*, State Industrial Commission.

Claim No. 47205, *Underwood*, Matter of *vs. International Elevating Co.*, Workmen's Compensation Commission.

Claim No. 28745, *Chas. Horan*, deceased, *vs. Tidewater Trans. Co.*, Workmen's Comp. Com., April 30, 1915.

An employee residing in Brooklyn working as an oiler on a steamship owned by a Kentucky corporation, is not entitled to compensation.

Sorensen, Matter of *vs. Southern Pacific Co.*, Workmen's Compensation Commission.

Compensation denied where the employee was injured while on a fishing trip in which all members of the crew shared the profits with the owner.

Claim No. 24213, *James J. McGraff*, deceased, *vs. Robert Tapper*, Workmen's Compensation Commission.

Where a person employed on a float was drowned in an unexplained manner, the body being found in the water three days later, compensation was awarded to the dependents.

File No. 575, *August Tirre*, deceased *vs. Bush Terminal Co.*, St. Ind. Com. Oct. 27, 1915. (Award reversed on question of dependency) App. Div. Third Dept. May 2, 1916, opinion by Lyon, J.

Where the captain of a vessel received wages at the rate of $50 per month including the services of his wife, the wife was held to be an employee and compensation was awarded at the rate of $3.85 per week.

Claim No. 31770, *Mary Secor*, Matter of *vs. Jas. A. Cullen, Jr.*, State Industrial Commission, July 26, 1915.

Group. 9. Shipbuilding, including construction and repair in a ship-yard or elsewhere, not included in group eight.

Group 10. Longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage.

Where a longshoreman is injured upon a vessel upon the navigable waters of the United States, including vessels tied to a dock, he has the option of claiming compensation or instituting a suit in Admiralty.

Walker, Matter of *vs. Clyde S. S. Co.*, 215 N. Y. 529.

In the case of *Burns*, Matter of *vs. Southern Pacific Co.*, 215 N. Y. Memo 738, the injury was received while the claimant was working on the dock and while the point was not expressly decided, the award being affirmed under the authority of the Walker case, it would seem to follow from the case of *Atlantic Transport Co., vs. Imbrovek*, 234 U. S. 52, that compensation is the only remedy where the injury does not happen on the vessel.

In *Jensen*, Matter of *vs. Southern Pacific Co.*, 215 N. Y. 514, the injury occurred while the longshoreman was at work on a gang plank between the vessel and the dock. The Court did not decide whether an employee injured under such circumstances had an option of remedies.

An employee sorting refuse which has been dumped from vessels is not engaged in longshore work.

Tomassi, Matter of *vs. Christensen*, 171 App. Div. 284; 156 N. Y. Supp. 905.

Employees engaged in ice harvesting were held by the Commission to be engaged in longshore work, but an employee engaged in ice harvesting was denied compensation by the Court in the case of

Aylesworth, Matter of *vs. Phoenix Cheese Co.*, 170 App. Div. 34; 155 N. Y. Supp. 916.

For a case in which a longshoreman in the employ of

a firm of stevedores was loaned to another firm, both firms being engaged in unloading the same vessel, in which it was held that the longshoreman was an employee of the latter, see,

File No. 7165, *Sala*, Matter of *vs. Martarella and Giannessi*, The Bulletin, Vol. 1, No. 6, page 11.

An employer furnishing a watchman for cargoes on piers is engaged in longshore work.

Axel Oberg, Matter of *vs. W. J. McRoberts & Co.*, State Industrial Com., Dec. 20, 1915. (On appeal.)

A person employed by a steamship company to watch the pier and boats while being loaded and unloaded is engaged in longshore work.

Frank J. Rodgers, Matter of *vs. Oceanic S. S. Navigation Co.*, State Industrial Com., Jan. 26, 1916.

Group 11. Dredging, subaqueous or caisson construction or repair, and pile driving. (Group 11, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

An employee receiving an injury while driving sheeting is engaged in pile driving within the meaning of this group.

Claim No. 70995, *Mazzarisi*, Matter of *vs. Ward and Tully*, 170 App. Div. 868; 156 N. Y. Supp. 964.

Where an employee residing on a dredge, received permission to go ashore; fell from the landing place and was drowned while waiting for a boat to take him back to the dredge, the widow was awarded compensation.

Claim No. 12205, *Albert Berg*, deceased, *vs. Great Lakes Dredge & Dock Co.*, State Industrial Commission, July 16, 1915. (Award reversed, App. Div., Third Dept., May 2, 1916, opinion by Cochrane, J.)

Group 12. Construction, installation, repair or operation of electric light and electric power lines, dynamos, or appliances, and power transmission lines. (Group 12, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Group 13. Paving; road building, curb and sidewalk construction or repair; sewer and subway construction or repair, work under compressed air, excavation, tunneling and shaft sinking, well digging, laying and repair of un-

derground pipes, cables and wires, not included in other groups; street cleaning, ashes, garbage or snow removal; operation of waterworks. (Group 13, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Compensation was awarded in the following cases where the employee was engaged in subway construction:

Where the employee was killed by a train while crossing the subway tracks to reach the street after quitting work, although it was unnecessary to cross the track.

Di Paola, Matter of *vs. Crimins Contracting Co.*, State Industrial Commission, Nov. 3, 1916. (Aff. App. Div., Third Department, May 2, 1916.)

Where the employee was injured while leaving the subway after having been discharged for the day.

Claim No. 225 n. c., *Kiernan*, Matter of *vs. Freidstadt Underpinning Co.*, 157 N. Y. Supp. 900; ——App. Div. ——.

Where the employee was killed by falling into an open sewer while attending a call of nature.

Claim No. 5869 n. c., *Cino*, Matter of *vs. Norton & Gorman Cont. Co.*, Aff. 156 N. Y. Supp. 1117. (Without opinion.)

Group 14. Lumbering; logging, river-driving, rafting, booming, saw mills, bark mills; shingle mills, lath mills, lumber yards; manufacture of veneer and of excelsior; manufacture of barrels, kegs, vats, tubs, staves, spokes or headings. (Group 14, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Group 15. Pulp and paper mills.

Group 16. Manufacture of furniture, interior woodwork, organs, pianos, piano actions, canoes, small boats, coffins, wicker and rattan ware; upholstering; manufacture of mattresses or bed springs.

Group 17. Planing mills, sash and door factories, manufacture of wooden and corrugated paper boxes, cheese boxes, mouldings, window and door screens, window shades, carpet sweepers, wooden toys, wooden articles and wares or baskets; cork cutting. (Group 17, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Group 18. Mining; reduction of ores and smelting;

preparation of metals or minerals; oil and gas wells. (Group 18, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Group 19. Quarries; sand, shale, clay or gravel pits, lime kilns; manufacture of brick, tile, terra-cotta, asbestos, fire-proofing, or paving blocks, manufacture of calcium carbide, cement, asphalt or paving material; stone crushing or grinding. (Group 19, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Group 20. Manufacture of glass, glass products, glassware, porcelain or pottery.

A firm engaged in cutting up and beveling glass for the purpose of making looking glasses is engaged in the manufacture of glass products within the meaning of this group, and compensation was awarded where the employee was injured while lifting glass from a table.

McQueeney, Matter of *vs. Sutphen & Meyer*, 167 App. Div. 528; 153 N. Y. Supp. 554.

Group 21. Iron, steel or metal foundries; rolling mills; manufacture of castings, forgings, heavy engines, locomotives, machinery, safes, anchors, cables, rails, shafting, wires, tubing, pipes, sheet metals, boilers, furnaces, stoves, structural steel, iron or metal; machine shops including repairs. (Group 21, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

A salesman injured while installing machinery is entitled to compensation.

File No. 1383, *Benton*, Matter of *vs. Fraser*, Aff. 156 N. Y. Supp. 1115. (Without opinion.)

Group 22. Operation and repair of stationary engines and boilers, freight and passenger elevators, not included in other groups; window cleaning; heating and lighting. (Group 22, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

The Commission has ruled that janitors and other employees who are required to operate stationary engines or boilers are entitled to compensation for an injury received in connection with this work. In Claim No. 5539, *Pranio*, Matter of *vs. Peloso*, 155 N. Y. Supp. 1135 (no opinion), the Appellate Division affirmed an

award where the janitor was injured while chopping wood for use in the boiler.

Group 23. Manufacture of small castings or forgings, metal wares, instruments, utensils and articles, hardware, nails, wire goods, screws, bolts, metal beds, sanitary, water, gas or electric fixtures, light machines, typewriters, cash registers, adding machines, carriage mountings, bicycles, metal toys, tools, cutlery, instruments, photographic cameras and supplies, sheet metal products, buttons; jewelry; gold, silver and plated ware; articles of bone, ivory and shell. (Group 23, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Horse-shoeing was placed in this group by the Commission, but the Appellate Division held in the case of *Grady,* Matter of *vs. Holliday,* 155 N. Y. Supp. 1110, that the business of horseshoeing was not included and an award of compensation made by the Commission was set aside. See Group 24 as amended, which now includes horseshoers.

Group 24. Manufacture of agricultural implements, threshing machines, traction engines, wagons, carriages, sleighs, vehicles, automobiles, motor trucks, toy wagons, sleighs or baby carriages; blacksmiths; horse-shoers. (Group 24, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Group 25. Manufacture of explosives and dangerous chemicals, corrosive acids or salts, ammonia, gasoline, petroleum, petroleum products, celluloid, gas, charcoal, artificial ice, gun powder or ammunition; ice harvesting, ice storage and ice distribution. (Group 25, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Group 26. Manufacture of paint, color, varnish, oil, japans, turpentine, printing and other ink, printers' rollers, tar, tarred, pitched or asphalted paper. (Group 26, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Group 27. Distilleries, breweries; manufacture of spirituous or malt liquors, alcohol, wine, mineral water or soda waters; bottling. (Group 27, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

An employee working for a firm engaged in the manufacture of soda, ice cream and candy, to be sold on the

premises, was awarded compensation for an injury received while cleaning glasses.

Paulsen, Matter of *vs. Schulmbohn*, 5 N. Y. St. Dep. Rep. 112.

Group 28. Manufacture of drugs and chemicals, not specified in group twenty-five, medicines, dyes, extracts, pharmaceutical or toilet preparations, soaps, candles, perfumes, non-corrosive acids or chemical preparations, fertilizers, including garbage or sewerage disposal plants; shoe blacking or polish. (Group 28, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

A wholesale druggist is engaged in the manufacture of drugs and chemicals within the meaning of this group and compensation was awarded to the dependents of one employed as a handy man, who was injured by falling down an elevator shaft while putting up a shelf.

Larsen, Matter of *vs. Paine Drug Company*, 169 App. Div. 838; 155 N. Y. Supp. 759. Aff —— N. Y. —— (Court of Appeals, May 12, 1916, opinion by Hiscock, J.)

A salesman injured by falling on the stairs while going from the factory room to the office room on separate floors in a loft building is entitled to compensation.

File No. 419, *Nicholson*, Matter of *vs. Klipstein & Co.* Aff. 155 N. Y. Supp. 1127. (Without opinion.)

This group does not cover a person injured while sorting refuse at a city dump.

Tomassi, Matter of *vs. Christensen, Jr.*, 171 App. Div. 284; 156 N. Y. Supp. 905.

Group 29. Milling; manufacture of cereals or cattle foods, warehousing; storage of all kinds and storage for hire; operation of grain elevators. (Group 29, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Storage means a place of storage where the goods of others are kept for hire and does not include a store house in connection with a wholesale establishment in which a wholesaler keeps his own surplus goods.

Mihn, Matter of *vs. Hussey*, 169 App. Div. 742; 155 N. Y. Supp. 860.

An employee engaged in buying and selling fruit for a firm engaged in the storage business is not entitled to compensation under this group.

Sickles, Matter of *vs. Ballston Refrigerator Co.*, 171 App. Div. 123; 156 N. Y. Supp. 864.

Where the employer was engaged in the storage, repair and sale of furniture, and the employee was injured while taking down a rug rack to make room for the storage of goods, compensation was awarded.

Claim No. 45, *George Burton*, Matter of *vs. James A. Whalen & Sons*, Aff. 156 N. Y. Supp. 1117. (Without opinion.)

This group was amended in 1916 to include storage of all kinds as well as storage for hire and the decision in *Mihn vs. Hussey*, has no application since the amendment became effective.

Group 30. Packing houses, meat markets, abattoirs, manufacture or preparation of meats or meat products or glue, gelatine, paste or wax. (Group 30, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Groups 30 and 33 do not cover the preparation of meat or foodstuffs for cooking purposes for domestic service or in hotels or restaurants, and a butcher or chef in a hotel is not covered.

De La Gardelle, Matter of *vs. Hampton Co.*, 167 App. Div. 617; 153 N. Y. Supp. 162.

An employee in a retail meat market injured while preparing meat in an electric meat chopper is within this group.

Kohler, Matter of *vs. Frohmann*, 167 App. Div. 533; 153 N. Y. Supp. 559.

An employer conducting a retail meat market is not engaged in the preparation of meat or meat products within the meaning of this group, and compensation was denied where a clerk and delivery man in a meat market received a fatal injury while delivering meat on foot.

Newman, Matter of *vs. Newman*, 169 App. Div. 745; 155 N. Y. Supp. 665.

Meat markets are expressly included under the

amendment of this group as made by the Legislature in 1916.

Group 31. Tanneries.

Group 32. Furriers; manufacture of leather goods and products, belting, saddlery, harness, trunks, valises, boots, shoes, gloves, umbrellas, rubber goods, rubber shoes, tubing, tires or hose. (Group 32, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Group 33. Canning or preparation of fruit, vegetables, fish or food stuffs; pickle factories and sugar refineries; manufacture of dairy products. (Group 33, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

A person employed to harvest ice for a company engaged in the manufacture of cheese is not employed in the preparation of food stuffs.

Aylesworth, Matter of *vs. Phoenix Cheese Co.*, 170 App. Div. 34; 155 N. Y. Supp. 916.

Ice harvesting, storage and distribution are now included in Group 25.

(See also De La Gardelle vs. The Hampton Co., 167 App. Div. 617; 153 N. Y. Supp. 162.)

Group 34. Bakeries, including manufacture of crackers and biscuits, manufacture of confectionery, spices or condiments.

Group 35. Manufacture of tobacco, cigars, cigarettes or tobacco products.

Group 36. Manufacture of cordage, ropes, fibre, brooms or brushes; manilla or hemp products.

Group 37. Flax mills; manufacture of textiles or fabric, spinning, weaving and knitting manufactories; manufacture of yarn, thread, hosiery, cloth, blankets, carpets, canvas, bags, shoddy or felt.

Group 38. Manufacture of men's or women's clothing, white wear, shirts, collars, corsets, hats, caps, furs or robes, or other articles from textile or fabrics. (Group 38, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

A model employed by a firm engaged in the manufacture of clothing is entitled to compensation under this group.

Claim No. 74369, *Bloomfield*, Matter of *vs. November*, Aff. 156 N. Y. Supp. 1116. (Without opinion.)

A salesman employed by a firm in the manufacture of

clothing may receive compensation for an injury received on the employer's premises in the course of his employment.

File No. 761. *Berlinger*, Matter of *vs. Ritchie & Cornell*, Aff. 156 N. Y. Supp. 1115. (Without opinion.)

A salesman employed by a firm engaged in the manufacture of women's clothing is not entitled to compensation for an injury received while passing through the factory caused by slipping on the floor.

Lyon, Matter of *vs. Windsor & Davis*, App. Div., Third Dept., May Term 1916, opinion by Woodward, J.; Kellogg, P. J., dissenting.

The manufacture of men's or women's clothing includes the manufacture of boys' or girls' clothing. (General Construction Law, Sec. 29, Sec. 55.)

A tailor working by the piece at his own residence is an employee engaged in the manufacture of clothing.

Claim No. 23927, *Fiocca*, Matter of *vs. Dillon*, State Industrial Commission, Feb. 10, 1916. The Bulletin, Vol. 1, No. 6, page 13.

Group 39. Power laundries; dyeing, cleaning or bleaching.

Group 40. Printing, engraving, photo-engraving, stereotyping, electrotyping, lithographing, embossing; manufacture of moving picture machines and films; manufacture of stationery, paper, cardboard boxes, bags, or wallpaper; and bookbinding. (Group 40, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Group 41. The operation, otherwise than on tracks, on streets, highways, or elsewhere of cars, trucks, wagons or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical or other power or drawn by horses or mules; public garages, livery, boarding or sales stables; movers of all kinds. (Group 41, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

A stableman employed by an express company is engaged in the operation of a vehicle within the meaning of Group 41.

Costello, Matter of *vs.* (*Taylor*) *American Express Co.*, 217 N. Y. 179.

A driver of a truck is engaged in the operation of a vehicle while caring for his team of horses in the stable at the end of the day's work.

Smith, Matter of *vs. Price*, 168 App. Div. 421; 153 N. Y. Supp. 221.

A driver was awarded compensation for the loss of an eye due to an accident while disinfecting stables.

Walker, Matter of *vs. M. Mossom Company*, 3 N. Y. St. Dep. Rep. 362.

"The loading and unloading of the wagon, the necessary care and attention to the wagon and to the horses; any act which falls within his duty as a teamster is within the protection of the law."

Dale, Matter of *vs. Saunder Brothers*, —— App. Div. ——; 157 N. Y. Supp. 1062; Aff. 218 N. Y. 59.

A helper on a truck is engaged in the operation of a vehicle.

Hendricks, Matter of *vs. Seaman Brothers*, 170 App. Div. 133; 155 N. Y. Supp. 638.

A porter receiving an injury while operating a hand truck was held to be engaged in the operation of a vehicle.

Claim No. 24089, *Vincent Farrar*, Matter of *vs. Gristede Bros., Inc.*, State Industrial Commission, January 19, 1916.

A delivery man making deliveries from a store on foot after putting up his horse and wagon for the day is not subject to the compensation law.

Newman, Matter of *vs. Newman*, 169 App. Div. 745; 155 N. Y. Supp. 665.

Compensation was denied where a clerk in a meat market was injured while going from the market to a wagon to assist in unloading meat.

File No. 2913, Matter of *Henry F. Buggel*, State Industrial Commission, January 13, 1916.

An elevator is not a vehicle within the meaning of Group 41.

Wilson, Matter of *vs. C. Dorflinger & Sons*, 218 N. Y. 84 (Court of Appeals, Apr. 25, 1916), reversing 170 App. Div. 119; 155 N. Y. Supp. 875.

(Both freight and passenger elevators were included in Group 22 by the amendments of 1916.)

The dependents of a superintendent of a building required to operate an elevator were awarded compensation where the employee was found dead at the bottom of the elevator shaft.

Sterling, Matter of *vs. Western Union Telegraph Co.*, The Bulletin, Vol. 1, No. 8, page 10.

Where a watchman who was required to operate an elevator was found dead at the bottom of the elevator shaft, it was decided that the injury was due to the operation of an elevator and that compensation should be paid under Group 41.

Claim No. 850, *William Fogarty*, deceased, *vs. National Biscuit Co.*, St. Ind. Com., Feb. 3, 1916, The Bulletin, Vol. 1, No. 6, p. 9.

Compensation awarded where the employee was injured while using a freight elevator.

Claim No. 70685, *Martucci*, Matter of *vs. Hills Brothers Co.*, 171 App. Div. 870; 156 N. Y. Supp. 833.

Compensation awarded under Group 41 where the employee was a porter and elevator man and was injured by falling on the stairs immediately after quitting work and leaving the elevator.

Claim No. 57177, *Foley*, Matter of *vs. Bretton Hall Company*, Aff. 156 N. Y. Supp. 1122. (Without opinion.)

Compensation was denied to dependents of an employee working as a night watchman who also operated an elevator and who was found dead near the doorway of the premises. The business of the employer was not classified as hazardous and there was no proof connecting the employee's death with the operation of the elevator.

Michael Fitzgibbons, deceased, *vs. Clarence S. Woodward*, State Industrial Commission, November 24, 1915.

(The decisions in Matter of Sterling, Fogarty, Fitzgibbons, Martucci and Foley, all elevator cases, were made before the decision of the Court of Appeals in Matter of Wilson. They may be regarded as authorities, however, for accidents subsequent to June 1, 1916,

from and after which elevators are included in Group 22.)

Group 42. Stone cutting or dressing; marble works; manufacture of artificial stone; steel building and bridge construction or repair; installation or repair of elevators, fire escapes, boilers, engines or heavy machinery; bricklaying, tile-laying, mason work, stone-setting, concrete work, plastering; and manufacture of concrete blocks; structural carpentry; painting, papering, picture hanging, glazing, decorating or renovating; sheet metal work; roofing; construction, repair and demolition of buildings or contents; bridges and other structures; salvage of buildings or contents; plumbing, sanitary lighting or heating installation or repair; installation and covering of pipes or boilers; junk dealers. (Group 42, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

A janitor who also repairs the building is not entitled to compensation under this group unless injured while engaged in repair work, and compensation was denied where the injury happened while the janitor was putting a flag on a flagpole.

Gleisner, Matter of *vs. Gross & Herbener*, 170 App. Div. 87; 155 N. Y. Supp. 946.

A carpenter employed casually to repair buildings is not covered by this group.

Bargey, Matter of *vs. Massaro Macaroni Co.*, 170 App. Div. 103; 155 N. Y. Supp. 1076.

An employee receiving an injury while working upon a stone crusher for a general contractor is entitled to compensation.

Claim No. 26818, *Dolici*, Matter of *vs. Chas. A. Meyer Cont. Co.*, Aff. 156 N. Y. Supp. 1120. (Without opinion.)

Group 43. Any employment enumerated in the foregoing groups and carried on by the state or a municipal corporation or other subdivision thereof, notwithstanding the definition of the term "employment" in subdivision five of section three of this chapter. (Group 43 added by L. 1916, Ch. 622, effective June 1, 1916.)

The State and municipal corporations were included within the term "employer" by Chapter 316, Laws of

1914, which amended Subdivision 3 of Section 3. The Attorney-General, in an opinion dated June 9, 1914, held that employees of the State and of a municipal corporation were not subject to the law except where such employees were engaged in hazardous employments carried on for pecuniary gain. Subsequently, the Attorney-General advised the Commission by letter, in effect, that neither the State nor a municipal corporation could carry on an employment for pecuniary gain. The effect of these rulings of the Attorney-General was to exclude all employees of the State and municipal corporations from the benefits of the compensation law. Group 43 expressly includes employees of the State or of municipal corporations engaged in any employment covered by the preceding 42 groups, without regard to the question of pecuniary gain.

The State or a municipal corporation having employees subject to the Compensation Law is bound by all provisions of the act. Security for the payment of compensation must be provided through one of the methods mentioned in Section 50, otherwise, in case of a suit for negligence, the State or the municipal corporation will be deprived of the defenses of contributory negligence, assumed risk and negligence of fellow employees.

SECTION 2, CONTINUED. ELECTIVE PROVISIONS.

Any employer not carrying on one of the employments enumerated in this section, or who carrying on one of such employments has in his employ an employee not included within the term "employee" as defined by section three of this chapter, and the employees of any such employer may, by their joint election, elect to become subject to the provisions of this chapter in the manner hereinafter provided. Such election on the part of the employer shall be made by posting notices thereof about the place where the workmen are employed, in a manner to be prescribed by rules to be adopted by the commission, and by filing with the commission a written statement, in a form to be prescribed by the commission, to the effect that he accepts the provisions of this chapter and that he adopts subject to the

approval of the commission one of the methods of securing compensation to his employees prescribed in section fifty of this chapter which, when so filed with and approved by the commission as to form and method of securing compensation shall operate to subject him to the provisions of this chapter and of all acts amendatory thereof for the period of one year from the date of such approval, and thereafter without further act on his part for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or any succeeding year, file with the commission a notice in writing that he withdraws his election.

Any employee in the service of any such employer shall be deemed to have accepted, and shall be subject to the provisions of this chapter and any act amendatory thereof, if, at the time of the accident for which liability is claimed, the employer charged with such liability has not withdrawn his election and the employee shall not at the time of entering into his contract of hire have given to his employer notice in writing that he elects not to be subject to the provisions of this chapter and filed a copy thereof with the commission, or in the event that such contract for hire was made in advance of the election of the employer, such employee shall not have given to his employer and filed with the commission within twenty days after such election notice in writing that he elects not to be subject to such provisions.

A minor employee shall be deemed sui juris for the purpose of making such an election.

The rights and remedies, benefits and liabilities of an employer or employee so electing to become subject to the provisions of this chapter shall thereupon become the same as they would have been had they been engaged in one of the occupations or employments enumerated herein and the words employer or employee wherever they appear in this chapter shall be construed as including an employer or employee who has so elected to become subject to its provisions. (The above portion of Section 2 relating to employers and employees who may become subject to the compensation law, by their joint election, added by L. 1916, Ch. 622, effective June 1, 1916.)

The above elective provision should be read in connection with Article 14 of the Labor Law, printed in full in the Appendix. Any provision of such article of the

Labor Law inconsistent with the foregoing is repealed by L. 1916, Ch. 622, Section 15, effective June 1, 1916.

§ 3. **Definition.** As used in this chapter, 1. "Hazardous employment" means a work or occupation described in section two of this chapter.

The benefits of the compensation law are limited to the hazardous employments enumerated in Section 2.

De La Gardelle, Matter of *vs. The Hampton Co.*, 167 App. Div. 617; 153 N. Y. Supp. 162.

Tomassi, Matter of *vs. Christensen*, 171 App. Div. 284; 156 N. Y. Supp. 905.

Undertaking and embalming is not included as a hazardous employment.

Claim No. 57508, *Foley*, Matter of *vs. Peter F. Doran*, Workmen's Comp. Com., March 29, 1915.

While an undertaker is not engaged in a hazardous employment, an employee working as a helper and driver of a vehicle is entitled to compensation under Group 41.

Claim No. 56433, *John T. Hillary*, Matter of *vs. Kaufman Brothers*, State Industrial Commission, Jan. 3, 1916.

A wholesale dealer is not engaged in a hazardous employment and compensation was denied to the widow of a salesman and buyer, who was drowned by the sinking of the Lusitania.

File No. 449, *Charles V. Mills*, Matter of *vs. L. B. Locke & Potts*, State Industrial Commission, July 12, 1915.

The operation of theatres is not classified as hazardous and compensation was denied to the widow of a property man killed by falling through a trap door.

Claim No. 52437, *Samuel Adler, deceased*, Matter of *vs. Thomashefsky Theatre Co.*, Workmen's Comp. Com.

Compensation was also denied where a property man was injured by falling over some steps.

Claim No. 50284, *Chas. O'Neill*, Matter of *vs. Booth Theatre*, State Industrial Commission, Nov. 29, 1915.

The manager or superintendent of a hotel injured

while repairing the premises is not engaged in a hazardous employment.

J. Irving Godder, Matter of *vs. Hartt*, et al., State Industrial Commission, Feb. 9, 1916.

While the operation of a garage was not a hazardous employment prior to the amendments of 1916, which included the operation of a garage in Group 41, an officer of a company conducting such business, injured while driving an automobile was held entitled to compensation as engaged in the operation of a vehicle.

Claim No. 37170, *Albert Keffer*, Matter of *vs. Yonkers Auto Repair Co.*, State Industrial Commission.

In the case of *Aylesworth*, Matter of *vs. Phoenix Cheese Co.*, 170 App. Div. 34; 155 N. Y. Supp. 916, the Appellate Division held that ice harvesting was not a hazardous employment. Ice harvesting is now included in Group 25 under the amendments of 1916, effective June 1, 1916.

The operation of lumber yards was not expressly included as a hazardous employment until the amendments of 1916, which added this employment to Group 14, and in Claim No. 3181, *Samuel Lepidus*, Matter of *vs. Empire City Lumber Co.*, decided January 26, 1916, compensation was denied where an employee was injured while unloading and piling lumber in a lumber yard.

2. "Commission" means the state industrial commission, as constituted by this chapter. (Subd. 2 am'd by L. 1916, Ch. 622.)

3. "Employer," except when otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation, employing workmen in hazardous employments including the state and a municipal corporation or other political subdivision thereof. (Subd. 3 am'd by L. 1914, Ch. 316.)

An employer conducting a non-hazardous employment is not liable for compensation except where the injury is occasioned while the employee is engaged in work expressly declared hazardous by the Act.

Gleisner, Matter of *vs. Gross & Herbener*, 170 App. Div. 37; 155 N. Y. Supp. 946.

Newman, Matter of *vs. Newman*, 169 App. Div. 745; 155 N. Y. Supp. 665.

Where the employer is carrying on one employment which is hazardous and another employment which is not within the Act, no compensation is payable for an injury received in the latter employment.

Sickles, Matter of *vs. Ballston Refrig. Storage Co.*, 171 App. Div. 123; 156 N. Y. Supp. 864.

Aylesworth, Matter of *vs. Phoenix Cheese Co.*, 170 App. Div. 34; 155 N. Y. Supp. 916.

An employer repairing his building is not engaged in the business of repair of buildings or structural carpentry.

Bargey, Matter of *vs. Massaro Macaroni Co.*, 170 App. Div. 103; 155 N. Y. Supp. 1076.

Where a person hires a wagon, team and driver and has control and direction over the work, the driver is an employee of such person, although employed and paid by the owner of the team and wagon.

Claim No. 25199, *Gimber*, Matter of *vs. T. P. Kane Co.*, 2 N. Y. St. Dep. Rep. 475; Aff. 155 N. Y. Supp. 1109. (Without opinion.)

Claim No. 54558, *Nolan*, Matter of *vs. Cranford Company*, 4 N. Y. St. Dep. Rep. 337; Aff. 155 N. Y. Supp. 1128. (Without opinion.)

Where the owner of the team retains control over the driver, the owner is held to be the employer although the driver is performing work for another.

It seems that both the owner of the team and the person for whom the team is working may be regarded as employers and both may be liable for compensation.

Dale, Matter of *vs. Saunder Brothers*, 157 N. Y. Supp. 1062; —— App. Div. ——, Third Dept., March 8, 1916; Aff. 218 N. Y. 59 (Court of Appeals, April 25, 1916.)

Where the claimant was one of two brothers who called themselves co-partners and it appeared that the claimant received a share of the profits but worked on a salary and was not liable for debts it was held that the

claimant was an employee instead of a co-partner, and entitled to compensation.

Claim No. 63985, *Walter E. Myerhof*, Matter of *vs. Myerhof Brothers*, State Industrial Commission, Oct. 20, 1915.

In Claim No. 8567, *Sol Turoff*, Matter of *vs. Archer Detective Agency* and *The United Fruit Co.*, where the detective agency furnished employees to the latter to perform longshore work, receiving a commission on the wages which were paid to the employees by the detective agency, such employees were held to be in the employ of the United Fruit Co., which had control over the work.

Where a firm of coal dealers employed a truckman at the request of a customer to deliver a load of coal, the truckman was held to be an employee of the coal dealers.

Claim No. 52857. *Christopher Beck*, deceased, *vs. Nichols & Webster*, State Industrial Commission, Nov. 15, 1915.

Where there is a dispute as to the employer, the question involved is a question of fact upon which the decision of the Commission is final.

Dale, Matter of *vs. Saunder Brothers*, 218 N. Y. 59, (Court of Appeals, Apr. 25, 1916.)

4. "Employee" means a person engaged in one of the occupations enumerated in section two or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants. (Subd. 4, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

An employee receiving an injury in the course of his employment, where both the employee and the employer are residents of New York State and the contract of employment was made in this State, is entitled to compensation where the injury was received in another State.

Valentine, Matter of *vs. Smith Angevine Co.*, 2 N. Y. St. Dep. Rep. 460; Aff. 216 N. Y. 544.

Post, Matter of vs. Burger & Gohlke, 153 N. Y. Supp. 505; 168 App. Div. 403; Aff. 216 N. Y. 544.

Dependents of an employee, a resident of New Jersey, employed in this State to perform work in West Virginia, are not entitled to compensation where the employee's death was due to injuries received while at work in West Virginia.

File No. 291, *Lloyd vs. Power Specialty Company*, State Industrial Com., The Bulletin, Vol. 1, No. 6, page 9.

A resident of this State employed by another resident of the State to perform work entirely in another state is not entitled to compensation under the Compensation Law of New York.

Gardner, Matter of *vs. Horsehead's Construction Co.*, 171 App. Div. 66; 156 N. Y. Supp. 899.

Claim No. 39670, *Pritz*, Matter of *vs. Baumont*, Award set aside, 154 N. Y. Supp. 1140. (Without opinion.)

A person who signed a false statement in writing to obtain employment (in violation of the Penal Law), is an employee entitled to compensation.

Kenny, Matter of *vs. Union Railway Company*, 166 App. Div. 497; 152 N. Y. Supp. 117.

A painter having a written contract to paint a sign guaranteeing the work which was performed entirely by himself is not an independent contractor, but is an employee, within the meaning of the compensation law.

Rheinwald, Matter of *vs. Builders Brick & Supply Co.*, 168 App. Div. 425; 153 N. Y. Supp. 598; reversing 1 N. Y. St. Dep. Rep. 417.

The owner of a dredge leasing same to a third party but having control over its operation is an independent contractor.

Powley, Matter of *vs. Vivian & Co.*, 169 App. Div. 170; 154 N. Y. Supp. 426.

Such independent contractor is an employee of the lessee while transporting supplies to the dredge for the lessee.

Powley, Matter of *vs. Vivian & Company* (above).

An employee of a person who is not engaged in a hazardous employment is not within the compensation

act unless performing work, at the time of the accident, which is expressly defined as hazardous.

Gleisner, Matter of *vs. Gross & Herbener*, 170 App. Div. 37; 155 N. Y. Supp. 946.

Newman, Matter of *vs. Newman*, 169 App. Div. 745; 155 N. Y. Supp. 665.

A person employed casually to repair the building where a hazardous employment is carried on is not an employee engaged in such hazardous employment.

Bargey, Matter of *vs. Massaro Macaroni Co.*, 170 App. Div. 103; 155 N. Y. Supp. 1076.

A police officer employed jointly by a town and by a company engaged in mining is an employee of the company while performing work as an officer in connection with the business of the company.

James, Matter of *vs. Witherbee Sherman Co.*, 2 N. Y. St. Dep. Rep. 483.

An officer of a corporation is an employee entitled to compensation while working as a foreman or mechanic.

Cantor, Matter of *vs. Rubin Musicant Company*, 3 N. Y. St. Dep. Rep. 392.

The captain of a lighter which had been leased to and was transporting goods for another was held to be an employee of the owner of the vessel.

Claim No. 23863, *Norman*, Matter of *vs. Empire Lighterage Co.*, 2 N. Y. St. Dep. Rep. 480.

A person employed as a mechanic who also owned a motor boat which he at times leased to and operated for his employer was held to be an employee and not an independent contractor while engaged in the operation of the boat.

Claim No. 54026, *Julius Olsen*, deceased, Matter of *vs. State Insurance Fund*, Workmen's Comp. Com., April 27, 1915.

A person repairing farm buildings is not an employee under the Compensation Act.

Claim No. 14407, *Fred McComsy*, Matter of *vs. George E. Simmons*, The Bulletin, Vol. 1, No. 6, p. 13.

A person employed casually by a truckman to assist in unloading a vehicle was held to be an employee of the firm by which the truckman was regularly employed.

Claim No. 38318, *Thos. Williams*, Matter of *vs. Messerau Metal Bed Co.*, Workmen's Comp. Com., May 12, 1915.

In a case where an employee was injured while operating a traction engine for a firm engaged in the threshing business, it was held that the claimant was not employed as a farm laborer and was entitled to compensation under Group 41.

File No. 17810, *Fred H. Green*, Matter of *vs. Miller & Miller*, State Industrial Commission, Jan. 31, 1916.

Where a company has work performed at its plant by the piece under an oral contract and furnishes the material, machinery, etc., persons hired by the contractor to assist in the work are employees of the company.

File No. 21001, *Ferdinando Carita*, Matter of *vs. Star Box & Lumber Co.*, State Industrial Commission, Dec. 20, 1915.

A resident of New Jersey employed by a company in Pennsylvania to perform work in the State of New York is entitled to compensation under the New York act for an injury received in this state.

Joseph Griffiths, Matter of *vs. American Bitumastic Enamel Co.*, State Industrial Commission, April 4, 1916.

(See also Part I, Sections 6, 7, 8, 10, 11, 12, 15, 16, and 19.)

5. "Employment" includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain, except where the employer and his employees have by their joint election elected to become subject to the provisions of this chapter as provided in section two. (Subd. 5, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

An employer keeping a store house in connection with the sale of merchandise by wholesale is not engaged in the storage business for pecuniary gain.

Mihn, Matter of *vs. Hussey*, 169 App. Div. 742; 155 N. Y. Supp. 860.

A hospital which distributes no profits although a fee is charged for the care and treatment of patients is not carried on for pecuniary gain.

Gamba, Matter of *vs. N. Y. Post-Graduate School & Hospital* Workmen's Comp. Com., March 29, 1915.

The industrial department of the Salvation Army, the profits of which are used for charitable and religious purposes, is not carried on for pecuniary gain and an employee of the Salvation Army is not entitled to compensation.

Scott, Matter of *vs. Salvation Army*, Workmen's Comp. Com., April 30, 1915.

A municipal corporation is not engaged in a trade, business or occupation for profit, although a revenue may be obtained from the operation of one of its departments.

Claim No. 33531, *Miallo*, Matter of *vs. City of Watertown, Board of Waterworks*, Workmen's Compensation Com., March 29, 1915.

Claim No. 25985, *Daniel J. Wigmore*, deceased, *vs. City of New York, Dept. of Docks & Ferries*, Workmen's Compensation Com., Feb. 8, 1915.

An employee injured while working for the State of New York engaged in the repair of a lock on the Erie Canal is not entitled to compensation.

Jennings, Matter of *vs. State of New York*, State Industrial Commission, Sept. 20, 1915.

(In connection with employees of the State and municipal corporations see Group 43, added by L. 1916, Ch. 622, effective June 1, 1916.)

A painter injured while painting the roof of a farm building is not employed in an occupation carried on by the employer for pecuniary gain.

Claim No. 14407, *Fred McComsy*, Matter of *vs. George E. Simmons*, The Bulletin, Vol. 1, No. 6, page 13.

A claim of an employee of a boat club injured while operating a motor boat was denied upon the ground that the business was not conducted for pecuniary gain.

Claim No. 11325, *Percy R. Downe*, Matter of *vs. Motor*

Boat Club of Buffalo, State Industrial Commission, Dec. 29, 1915.

6. "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein.

7. "Injury" and "personal injury" mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom.

ACCIDENTAL INJURIES.

The following injuries were held to be accidental injuries:

Where a railroad employee was poisoned with poison ivy.

Plass, Matter of *vs. New England Railway Co.*, 169 App. Div. 826; 155 N. Y. Supp. 854.

Where the employee became insane as a result of the mental shock of an accident.

McMahon, Matter of *vs. Interborough Rapid Transit Co.*, 5 N. Y. St. Dep. Rep. 109.

Hernia caused by a strain from lifting a piano.

Mooney, Matter of *vs. Weber Piano Company*, Aff. 156 N. Y. Supp. 1135. (Without opinion.)

Hernia caused by fall from a wagon.

Ulrich, Matter of *vs. Lenox Coat, Apron & Supply Co.*, Aff. 155 N. Y. Supp. 1145. (Without opinion.)

Anthrax contracted through an abrasion of the skin while handling wool.

Claim No. 65555, *Henry*, Matter of *vs. G. Levor & Co.*, State Industrial Commission.

Freezing where the employee was subjected to more than the ordinary hazard of cold weather.

Aylesworth, Matter of *vs. Phoenix Cheese Co.*, 170 App. Div. 34; 155 N. Y. Supp. 916.

Cole, Matter of *vs. Calahan & Sperry*, 4 N. Y. St. Dep. Rep. 348.

Linck, Matter of *vs. Millard*, 4 N. Y. St. Dep. Rep. 385.

Where the injured workman was disabled by an electric shock from a stroke of lightning while handling iron cans during a thunder storm.

Claim No. 26553, *Floyd Bates*, Matter of *vs. Alonzo Miles*, Workmen's Comp. Com., February 8, 1915.

Where a puddler in an iron factory fell and was injured as a result of a fainting spell brought on by overheating.

File No. 14876, *Patrick Fennelly*, Matter of *vs. Burden Iron Co.*, Workmen's Compensation Commission.

Where an employee working for a firm engaged in the manufacture of chemicals was disabled from poisonous fumes which were caused by overheating the chemicals.

Claim No. 24411, *Marthias Kratz*, Matter of *vs. Sup. Chemical Co.*, State Industrial Com., March 6, 1916.

Injuries resulting from assaults by fellow employees.

Yume, Matter of *vs. Knickerbocker Portland Cement Co.*, 3 N. Y. St. Dep. Rep. 353; Aff. without opinion 153 N. Y. Supp. 1151; appeal dismissed 216 N. Y. Memo. 653.

Harnett, Matter of *vs. Thos. J. Steen Bldg. Construction Co.*, 2 N. Y. St. Dep. Rep. 492, Aff. without opinion 153 N. Y. Supp. 1119; appeal dismissed 216 N. Y. 101.

Heitz, Matter of *vs. Ruppert*, (155 N. Y. Supp. 1112), Aff. —— N. Y. ——, May 2, 1916.

INJURIES NOT ACCIDENTAL.

In the following cases compensation was denied because the injury resulting in disability was not due to an accident.

Where the claimant was disabled by loss of vision due to a very strong light under which he was required to work.

Claim No. 55428, *John H. Surfass vs. American La France Fire Engine Co.*, State Industrial Commission.

Where a printer was disabled from blood poisoning alleged to have been caused by dust and dirt from a falling ceiling, there being no evidence to show that there was any abrasion of the skin.

Claim No. 71773, *George Watters vs. Francis E. Fitch Co.*, State Industrial Commission, Sept. 27, 1915.

Where the injury was due to lead poisoning.

Claim No. 54764, *Ike Rachlin*, Matter of *vs. Danziger Paint Co.*, State Industrial Commission, June 30, 1915.

Where the injury consisted of a cramped hand due to the continual use of a heavy axe.

Claim No. 67003, *William H. Smart vs. Cruss Kemper Co.*, State Industrial Com.

Where the constant twisting of the arm while handling cans for the purpose of inspection resulted in an injury to the elbow joint causing disability to work.

Claim No. 13733, *William H. J. Tracy vs. De Laval Separator Co.*, State Industrial Commission, Jan. 18, 1916.

Where the employee received a cut from a razor while being shaved, which subsequently became infected with anthrax in the course of his employment, causing death.

File No. 15061, *William I. Eldridge*, deceased, Matter of *vs. Endicott Johnson & Co.*, State Industrial Commission, April 12, 1916.

ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

In the following cases it was held that the injuries arose out of and in the course of the employment:

A foreman assaulted by two fellow employees to whom he was giving instructions.

Claim No. 15210, *Yume*, Matter of *vs. Knickerbocker Portland Cement Co.*, 3 N. Y. St. Dep. Rep. 353; Aff. without opinion 153 N. Y. Supp. 1151; appeal dismissed 216 N. Y. Memo. 653.

An employee assaulted by fellow employees who had previously been discharged, between which bad feeling existed.

Claim No. 180, *Harnett*, Matter of *vs. Thos. J. Steen Bldg. Const. Co.*, 2 N. Y. St., Dep. Rep. 492; Aff. without opinion 153 N. Y. Supp. 1119; appeal dismissed 216 N. Y. 101.

A driver who lost an eye through a scuffle with a fellow employee after a dispute concerning the care of horses.

Claim No. 8749, *Heitz*, Matter of *vs. Ruppert*, Aff. 155 N. Y. Supp. 1112 (Without opinion), Aff. —— N. Y. ——, May 2, 1916.

Railroad employee injured by movement of car under which he was seeking shelter from rain.

Moore, Matter of *vs. Lehigh Valley R. R. Co.*, 154 N. Y. Supp. 620; 2 N. Y. St. Dep. Rep. 472; 169 App. Div. 177.

Employee injured while cleaning his own motorcycle prior to starting work, the motorcycle being used in going to and from work and in connection with the business.

Kingsley, Matter of *vs. Donovan*, 169 App. Div. 828; 155 N. Y. Supp. 801.

Helper on truck who fell from wagon in attempting to drive boys away from the wagon.

Hendricks, Matter of *vs. Seaman Brothers*, 155 N. Y. Supp. 638; 170 App. Div. 133.

A seaman who was drowned by falling into the water after boarding an adjoining boat.

Claim No. 29452, *Lazerick*, Matter of *vs. N. Y., N. H. & H. R. R. Co.*, Aff. 155 N. Y. Supp. 1119. (Without opinion.)

Employee of a street railroad company who reported for work early by mistake and was injured while boarding a car to report for work at another place at a later time.

Claim No. 33284, *Morrisey*, Matter of *vs. New York Railways Co.*, Aff. 154 N. Y. Supp. 1134. (Without opinion.)

A sales manager injured by falling on the stairs while proceeding from the shop to the office.

File No. 419, *Nicholson*, Matter of *vs. A. Klipstein & Co.*, Aff. 155 N. Y. Supp. 1127. (Without opinion.)

An employee who took poison by mistake after being told by his foreman to obtain some salts, both drugs being kept on the premises.

Claim No. 12421, *O'Neil*, Matter of *vs. Carley Heater Co.*, Aff. App. Div., Third Dept., March 8, 1916. (Without opinion.)

An employee in a subway injured by falling into an open sewer, while attending to a call of nature.

Cino, Matter of *vs. Norton Gorman Contracting Co.*, Aff. 156 N. Y. Supp. 1117. (Without opinion.)

An employee injured while assisting the employee of another contractor upon the same building.

Claim No. 27411, *Harrison*, Matter of *vs. Kane*, Aff. 153 N. Y. Supp. 1119. (Without opinion.)

An employee injured while leaving the subway after having been discharged for the day.

Claim No. 225 (n. c.), *Kiernan*, Matter of *vs. Freistadt Underpinning Co.*, App. Div., Third Dept., March 8, 1916, 157 N. Y. Supp. 900.

An employee who was killed while assisting an employee of another contractor on the same premises who was caught in a trench after a cave-in.

Waters, Matter of *vs. W. J. Taylor Co.*, 154 N. Y. Supp. 1149; Aff. —— N. Y. —— (Court of Appeals, May 12, 1916, opinion by Hiscock, J.).

A railroad employee injured while crossing the tracks on way to dinner.

Carini, Matter of *vs. Nickel Plate R. R. Co.*, 4 N. Y. St. Dep. Rep. 423.

A railroad employee struck by train while getting a drink of water.

Solle, Matter of *vs. N. Y., N. H. & H. R. R. Co.*, 4 N. Y. St. Dep. Rep. 492.

A railroad employee who was injured through burns from waste which he was using and which became ignited.

Siepienska, Matter of *vs. New York Central R. R. Co.*, 4 N. Y. St. Dep. Rep. 395.

A watchman who was injured by falling from a building under construction.

Sorge, Matter of *vs. Alderbrau Company*, 3 N. Y. St. Dep. Rep. 390.

Where the death of an employee was due to a fall caused by a slippery floor.

Claim No. 4475, *Winters*, Matter of *vs. New York Herald Co.*, Aff. 155 N. Y. Supp. 1149. (Without opinion.)

An employee injured by stumbling over a lumber pile on leaving the premises by a short cut immediately after leaving work.

Bennett, Matter of *vs. A. U. Kressell*, St. Industrial Com., Jan. 5, 1916.

Injuries received by a claim agent while riding upon a car due to someone stepping on his foot resulting in gangrene, causing death.

File No. 359, *Brown*, Matter of *vs. Richmond L. & R. R. Co.*, State Industrial Com., Feb. 3, 1916, The Bulletin, Vol. 1, No. 6, page 12.

Where a non-Union man was assaulted by Union men who had lost their jobs and were on a strike.

Claim No. 40846, *Clay*, Matter of *vs. The Jas. Thompson Steel Const. Co.*, Workmen's Comp. Com., Feb. 24, 1915.

Where a driver while passing from his vehicle to the sidewalk to deliver a package was struck by an automobile.

Charles R. Miller, deceased, *vs. American Express Co.*, State Industrial Commission, Jan. 26, 1916.

Where a foreman working for a firm engaged in the operation of vehicles and of a boarding stable, who resided on the premises, was killed by falling on the stairs while going from his living rooms to the employer's office on the floor below.

File No. 70582, *Hugh Leslie*, deceased, *vs. O'Connor & Richman*, State Industrial Commission, July 28, 1915; Aff. App. Div., Third Dept., May 2, 1916.

Where employees were permitted to eat lunch on the premises and to draw hot water from a heater during which the claimant was injured.

Claim No. 9023, *Tillie O'Connor*, Matter of *vs. Harper Brothers*, State Industrial Com., Dec. 22, 1915.

Where the employee was permitted to eat lunch on the premises and was injured during the noon hour while attempting to prevent a door from closing.

File No. 6543, *Louis Stein*, Matter of *vs. John Wegman*, State Industrial Com.

INJURIES NOT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

In the following cases it was held that the injuries did not arise out of and in the course of the employment:

An employee of a street railroad company who was struck by a car immediately after leaving his employment and while on his way to have his watch tested.

De Voe, Matter of *vs. New York State Railways*, 169 App. Div. 472; 155 N. Y. Supp. 12.

Girl in toilet injured by another girl forcing a pair of scissors through a crack.

De Phillippis, Matter of *vs. Faulkenburg*, 170 App. Div. 153; 155 N. Y. Supp. 761.

(NOTE: In the above case the Court held that the injuries were accidental and happened in the course of the employment, but set aside the award because the injuries did not arise out of the employment.)

An employee who was struck by a train after having mailed a letter on her way home after work.

Pogue, Matter of *vs. Nassau Light & Power Co.*, 1 N. Y. St. Dep. Rep. 429.

Where the employee was struck by a train and killed while walking on the railroad tracks instead of on an adjoining private road while returning from work.

Hotaling, Matter of *vs. Standard Oil Company*, The Bulletin, Vol. 1, No. 1, page 12.

An injury caused by falling from a truck upon which the employee had caught a ride while proceeding from work to his employer's office.

Peers, Matter of *vs. De Carion & Company*, The Bulletin, Vol. 1, No. 2, page 10.

Where the employee was killed by falling on the street while at work resulting in fracture of the skull, the fall being caused by cardiac syncope.

Collins, Matter of *vs. Brooklyn Union Gas Co.*, 171 App. Div. 381; 156 N. Y. Supp. 957; reversing 4 N. Y. St. Dep. Rep. 449.

Where the employee was injured by stumbling over a pail containing broken glass while making deliveries on foot.

Newman, Matter of *vs. Newman*, 169 App. Div. 745; 155 N. Y. Supp. 665.

(For a discussion of accidents due to street risks, see opinion in the above case by Lyon, J.)

Where the claimant was injured by the deliberate assault of a fellow employee, the assault having no connection with the employment.

Claim No. 6222, *Adam Myers*, Matter of *vs. Edward J. Smith*, Workmen's Comp. Com., March 29, 1915.

Where the employee fell through a skylight after eating her lunch on the premises during the noon hour.

Claim No. 21382, *Rose Lederer*, Matter of *vs. Deutsch Brothers*, State Industrial Commission, Feb. 14, 1916.

Where the employee received an injury on the street while going from his home to the employer's barn.

Claim No. 26933, *Levi Crouse*, Matter of *vs. John J. Collins & Sons*, Work. Comp. Com., Feb. 5, 1915.

Where an engineer got into a dispute with a fireman who was visiting the plant, and ordered him to leave, resulting in a fight or scuffle in which the employee picked up a wrench whereupon he was struck by the fireman, fell and received a fracture of the skull, causing death.

Death File No. 248, *Herman Ludwig*, deceased, *vs. M. Groh's Sons*, State Industrial Commission, March 9, 1916.

Where the injured workman had an artificial limb which was broken in an accident, a claim for a new artificial limb was denied upon the ground that the injury was not a personal injury.

Claim No. 14847, *James White*, Matter of *vs. Cruss Kemper Co.*, State Industrial Com., Jan. 19, 1916.

(In connection with the definition of injuries subject to the compensation law, see also Part I, Sections 4, 13 and 18.)

(For additional cases under compensation statutes defining accidental injuries, see references to Negligence and Compensation Cases, Annotated, 9 N. C. C. A. 1213, 1214.)

(For additional cases construing the phrase "arising out of and in the course of the employment" see references to Negligence and Compensation Cases, Annotated, 9 N. C. C. A. 1224, 1225, 1226.)

(See also editorials, New York Law Journal, October 19, 1915, and November 24, 1915, in relation to injuries resulting from assault and frolicking, and opinion by Pound, J., in *Heitz, Matter of vs. Ruppert,* decided by the Court of Appeals, May 2, 1916.)

8. "Death" when mentioned as a basis for the right to compensation means only death resulting from such injury.

DISEASES RESULTING FROM ACCIDENTS.

In the following cases the disease causing the death of the employee was held to have naturally and unavoidably resulted from an accident injury:

Delirium tremens and alcoholic meningitis brought on by a blow from a falling object.

Dunn, Matter of *vs. West End Brewing Co.,* 5 N. Y. St. Dep. Rep. 113.

Pneumonia following an operation for hernia caused by fall.

Moore, Matter of *vs. Wm. Harkins Co.,* 4 N. Y. St. Dep. Rep. 383.

Tetanus resulting from an injury to the toe.

Broderick, Matter of *vs. Southern Pacific Co.,* 4 N. Y. St. Dep. Rep. 371.

Heart disease due to long hours of employment and over-work.

McMurray, Matter of *vs. J. J. Little & Ives Co.,* 3 N. Y. St. Dep. Rep. 395.

Peritonitis and tubercular trouble following a fracture of the leg.

Cappelli, Matter of *vs. F. R. Cranford, Inc.,* The Bulletin, Vol. 1, No. 3, page 11.

Pulmonary tuberculosis contracted from falling into the water.

Rist, Matter of *vs. Larkin & Sangster,* 171 App. Div. 108; 156 N. Y. Supp. 875.

Pleurisy following an injury to the side.

Henry La Fleur, deceased, Matter of *vs. Geo. M. Wood, Jr.*, State Industrial Commission, March 14, 1916.

Typhoid fever aggravated by an accident.

George Banks, deceased, *vs. Adams Express Co.*, State Industrial Commission, March 7, 1916.

Cancer aggravated by an accident.

Hans Max Blatt, deceased, *vs. Schoenberger & Noble*, File No. 269, The Bulletin, Vol. 1, No. 6, page 10.

Septicaemia resulting from an injury and a pre-existing diseased condition.

Mazarizzi, Matter of *vs. Ward & Tully*, 170 App. Div. 868; 156 N. Y. Supp. 964.

Lobar pneumonia and alcoholic poisoning or delirium tremens accelerated by injuries received in an accident.

Sullivan, Matter of *vs. Industrial Engineering Co.*, Aff. App. Div., Third Dept., May 2, 1916, opinion by Woodward, J.

(See Matter of Plass above, where death was due to pneumonia following sickness from poison ivy, and Matter of Brown, where death was due to gangrene following an accident.)

(See also editorial on "Accidental Contraction of Diseases," New York Law Journal, November 26, 1915.)

DISEASES NOT RESULTING FROM ACCIDENTS.

In the following cases it was held that the disease from which the employee died was not due to an accidental injury:

Lobar pneumonia causing death 42 days after the amputation of a finger.

Stanley, Matter of *vs. Wood & Dolson Company*, The Bulletin, Vol. 1, No. 4, page 10.

Where death was due to blood poisoning which did not develop from the accident.

Partridge, Matter of *vs. Norwich Pharmacal Co.*, The Bulletin, Vol. 1, No. 3, page 10.

Where the employee died from natural causes and there was insufficient evidence to establish an accident.

Butler, Matter of *vs. Sheffield Farms*, The Bulletin, Vol. 1, No. 4, page 11.

Where death was due to apoplexy alleged to have been induced by the operation of a compressed air drill, the Commission holding that the claim was founded on conjecture.

Claim No. 71756, *Frank Mohr*, deceased, Matter of *vs. Fred'k L. Cranford, Inc.*, The Bulletin, Vol. 1, No. 6, page 10.

9. "Wages" means the money rate at which the service rendered is recompensed under contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer.

Tips will not be taken into consideration in determining the wages of a person employed as a taxicab driver at a salary of $12 per week.

Claim No. 14485, Matter of *Edgar J. Noonan vs. Yellow Taxicab Service*, State Industrial Commission, March 13, 1916.

A contrary decision was rendered by the State Industrial Commission on the question of tips in File No. 14084, *Warren Sloat*, Matter of *vs. Rochester Taxicab Co.*, on May 12, 1916. The decision in the Sloat case was expressed in the following resolution:

"Resolved, That, as a result of Deputy Commissioner Phillip's investigation he finds that the average tips received amounts to $.85 a day, and the carrier and the attorney for the claimant agree that the tips received by taxicab drivers in the City of Rochester and by this claimant, amount to approximately $.85 a day, the Commission therefore modifies the original award to provide that compensation shall be based upon a fixed average of $12.00 a week, plus $5.10 received as tips, making in all $17.10 per week."

A person employed to drive an automobile in a racing contest who was to receive a commission on the winnings of his car and was to have a drawing account of $25 per week to be deducted from any of his winnings, was held to be an employee and where such employee died from

injuries received while racing his car, the widow was awarded compensation based upon a wage rate of $25 per week.

Dearborn, Matter of *vs. Peugeot Auto Import Co.*, State Industrial Commission, Feb. 3, 1916. (Former award vacated, 170 App. Div. 93; 155 N. Y. Supp. 769.)

The Commission has ruled that wages as defined by this subdivision includes the value of free board and free rent furnished by the employer, and where the deceased workman received wages and also free rent equal to $10 per month, the compensation to the widow was based upon the average weekly wage which was computed by adding the value of the rent to the weekly wages.

Claim No. 460, *John L. Sullivan*, Matter of *vs. Church E. Gates & Co.*, Workmen's Comp. Com., Dec. 8, 1914.

10. "State fund" means the state insurance fund provided for in article five of this chapter.

11. "Child" shall include a posthumous child and a child legally adopted prior to the injury of the employee; and a step-child dependent upon the deceased. (Subd. 11, am'd L. 1916, Ch. 622, effective June 1, 1916.)

In Claim No. 33284, Matter of *Morrisey vs. New York Railways Co.*, aff. 154 N. Y. Supp. 1134, without opinion, the Commission held that stepchildren of the deceased employee were not entitled to compensation. Under the amendment of 1916, effective June 1, 1916, stepchildren receive compensation if dependent upon the deceased.

In Death File No. 394, *Charles Tremberger*, deceased, the Commission has certified to the Appellate Division the question as to whether illegitimate children are entitled to death benefits.

12. "Insurance carrier" shall include the state fund, stock corporations or mutual associations with which employers have insured, and employers permitted to pay compensation directly under the provisions of subdivision three of section fifty.

13. "Manufacture," "construction," "operation" and "installation" shall include "repair," "demolition" and "alteration." (Subd. 13, added by L. 1916, Ch. 622, effective June 1, 1916.)

(NOTE: In connection with the effect of this subdivision, see Part I, Sec. 11, relating to casual employees.)

ARTICLE 2.

COMPENSATION.

Section 10. Liability for compensation.
11. Alternative remedy.
12. Compensation not allowed for first two weeks.
13. Treatment and care of injured employees.
14. Weekly wages basis of compensation.
15. Schedule in case of disability.
16. Death benefits.
17. Aliens.
18. Notice of injury.
19. Medical examination.
20. Determination of claims for compensation.
21. Presumptions.
22. Modification of award.
23. Appeals from the commission.
24. Costs and fees.
25. Compensation, how payable.
26. Enforcement of payment in default.
27. Depositing future payments.
28. Limitation of right to compensation.
29. Subrogation to remedies of employee.
30. Revenues or benefits from other sources not to affect compensation.
31. Agreement for contribution by employee void.
32. Waiver agreements void.
33. Assignments; exemptions.
34. Preferences.

§ 10. Liability for compensation. Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the willful intention of the injured employee to bring about

the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty. Where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty, neither the injured employee nor any dependent of such employee shall receive compensation under this chapter.

NOTE: This section follows the wording of the constitutional amendment, (Art. 1, Section 19.) It makes the act compulsory for compensatable injuries without regard to fault as a cause thereof with the two exceptions noted in the section. That the compensation law is compulsory was declared by the Court of Appeals in Matter of *Post vs. Burger & Gohlke,* 216 N. Y. 544, 550.

Practically no injuries are excluded as due to intoxication because to show that an injury is *solely* due to intoxication is almost impossible of proof. This question was raised in Matter of *Kiernan vs. Freidstadt Underpinning Co.,* where the employee was sent home because he had been drinking and was injured while leaving his work in the subway, but the award made by the Commission was affirmed by the Appellate Division of the Supreme Court. No claim has yet arisen where the injury was due to the willful intention of the employee to injure himself or another. For a case in which this contention was raised in which the Commission held to the contrary and awarded compensation, see *Ignatowsky,* Matter of *vs. Berman,* The Bulletin, Vol. 1, No. 3, page 9.

Many compensation statutes exempt injuries due to the willful misconduct of the workman. While such injuries are not expressly exempted by this section, it is claimed that an injury due to the willful misconduct of the employee, such as an injury due to the willful violation of a rule, does not arise out of the employment. The Commission has ruled to the contrary on this question but it has not been decided by the Courts.

Compulsory compensation statutes are also in force in Arizona, California, Maryland, Ohio, Oklahoma, Wash-

ington, Wyoming and Hawaii. In the remaining states which have compensation statutes the law is optional or "elective" except that in some of the states, the law is compulsory as to employees of municipalities.

In the Jensen case the Court of Appeals decided that the enactment of this section was a proper exercise of the police power of the State of New York and that the liability prescribed thereby does not constitute the taking of property without due process of law in violation of the 14th amendment of the Federal constitution.

The doctrine of *respondeat superior* has no application in compensation cases nor are the rules of employers liability for negligence controlling.

Dale, Matter of *vs. Saunders Brothers*, 218 N. Y. 59. (Court of Appeals, April 25, 1916.)

§ 11. **Alternative remedy.** The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. (Section 11 am'd by L. 1914, Ch. 316, and as amended by L. 1916, Ch. 622, effective June 1, 1916.)

(This section makes the compensation remedy exclusive as to compensatable injuries where security is given for the payment of compensation. For the liability of employers who are not subject to the compensation law,

see Article 14 of the Labor Law in the Appendix hereto.)

The term "legal representative" as used in this section means the dependent or dependents of the deceasd and not the administrator or the executor of the estate.

Dearborn, Matter of *vs. Peugeot Auto Import Co.*, 170 App. Div. 93; 155 N. Y. Supp. 769.

This section does not prohibit an action to recover damages for disfigurement nor an action to recover damages for an injury for which no compensation is provided by Section 15.

Shinnick vs. Clover Leaf Farms, 152 N. Y. Supp. 649; s. c. 154 N. Y. Supp. 423; 169 App. Div. 236.

This section does not prohibit an action to recover damages by the administrator on behalf of next of kin not included as dependents under Section 16.

Shanahan, vs. Monarch Engineering Co., 156 N. Y. Supp. 143.

(In a decision handed down March 22, 1916, in Special Term, in the case of Michael Connors vs. Semet-Solvay Co., Supreme Court Justice Andrews refused to follow the decision in the Shinnick case in relation to disfigurement, holding that the Court of Appeals had expressed a contrary view in the Jensen case, 215 N. Y. 514.)

The amendment made to this section by the Laws of 1916 was intended to exclude actions to recover damages for loss of services, for an injury for which no compensation is provided, and actions by dependents who receive no compensation. As Section 15 was also amended to authorize an award of compensation for disfigurement, the amendment bars such actions. In the absence of any provision in lieu of damages, the amendment will doubtless have no effect upon actions to recover for loss of services and to recover damages by dependents who receive no compensation. As to the latter class of cases, see Part I, Sec. 14.

§ 12. Compensation not allowed for first two weeks. No compensation shall be allowed for the first fourteen

days of disability, except the benefits provided for in section thirteen of this chapter.

§ 13. **Treatment and care of injured employees.** The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus as may be required or be requested by the employee, during sixty days after the injury. If the employer fail to provide the same, the injured employee may do so at the expense of the employer. The employee shall not be entitled to recover any amount expended by him for such treatment or services unless he shall have requested the employer to furnish the same and the employer shall have refused or neglected to do so. All fees and other charges for such treatment and services shall be subject to regulation by the commission as provided in section tweny-four of this chapter, and shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living.

(The Commission has ruled that it has no jurisdiction in relation to medical services except to regulate the reasonableness of the charges as provided by this section and approve of claims for such services as provided by Section 24. After the medical fees and charges have been regulated and approved by the Commission, the physician must enforce his claim by suit.)

Where the injured workman requests the employer to furnish medical services; refuses the services of the physician selected by the employer and employs his own physician, the employer is not liable for the expenses of such medical treatment.

Keigher vs. General Electric Company, App. Div., Third Dept., May 2, 1916, opinions by Cochrane, J., and Kellogg, P. J.

Where the Commission has approved the account of a physician for medical services procured by the employee and the amount is treated as part of the compensation awarded to the employee, the physician has no right of action against the employer for such medical services, although the employee has assigned to the physician the

portion of his award included as compensation for medical services.

Bloom vs. Jaffe, 94 Misc. 222; 157 N. Y. Supp. 926.

In an action by a hospital to recover its charges for the care of a minor employee of defendant who had suffered personal injury, not based on the Workmen's Compensation Act, the plaintiff must show by fair preponderance of evidence an express or implied contract that defendant would pay such fees.

Homeopathic Hospital of Albany vs. Chalmers, 157 N. Y. Supp. 1000.

§ 14. Weekly wages basis of compensation. Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation or death benefits, and shall be determined as follows:

1. If the injured employee shall have worked in the employment in which he was working at the time of the accident, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed.

NOTE: The Commission has ruled that this subdivision cannot reasonably and fairly be applied where the employee works Sundays as well as week days.

After an investigation it was determined that such employees worked 332 days per year upon an average and this numeral is used in computing the average annual earnings of employees who work seven days per week.

(For a case in which this ruling was applied, which is now on appeal, see Claim No. 29483, *Lamont Prentiss vs. New York State Railways Co.*, State Indus. Com., November 15, 1915.)

Where an employee who was usually employed as a skilled workman at the rate of $4 per day but at the time of the injury because of slack work, was working as a

laborer at the rate of $2 per day, the compensation was based upon the $2 per day rate of wages.

Claim No. 30288, *Edward Burke*, Matter of *vs. Industrial Engineering Co.*, Workmen's Compensation Com., Feb. 8, 1915.

2. If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

The average annual earnings of extra employees who work as the occasion requires when called upon by the employer are determined by the rate of wages paid to regular employees of the same class.

Claim No. 36456, *Christopher Fagan*, Matter of *vs. United Traction Co.*, State Industrial Commission, February 23, 1916.

3. If either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied, such annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the accident;

NOTE: This subdivision applies to what is known as seasonable employments which are only operated during a portion of the year. The Commission, however, may at any time resort to this subdivision in any individual claim if the method prescribed by the two preceding subdivisions cannot reasonably and fairly be applied.

For a case in which an award of compensation was upheld under subdivision 3, see *Rhyner*, Matter of *vs. Huber Bldg. Co.*, 171 App. Div. 71; 156 N. Y. Supp. 903.

4. The average weekly wages of an employee shall be one-fifty-second part of his average annual earnings;

The determination of the average weekly wages of an employee is a question of fact and where there is any evidence supporting the decision of the Commission, its determination will be affirmed.

Fairchild, Matter of *vs. Pennsylvania R. R. Co.,* 155 N. Y. Supp. 751; 170 App. Div. 135.

Friedenberg, Matter of *vs. Empire United Railways,* 168 App. Div. 618; 154 N. Y. Supp. 851.

5. If it be established that the injured employee was a minor when injured and that under normal conditions his wages would be expected to increase, the fact may be considered in arriving at his average weekly wages.

The increase of the wages of a minor under normal conditions may be taken into consideration in arriving at the average weekly wage where the injury results in death as well as in cases of disability.

Kilberg, Matter of *vs. Vitsch,* 171 App. Div. 89; 156 N. Y. Supp. 971.

For a disability case in which compensation was increased because the wages of the injured workman who was a minor were likely to increase, see

Claim No. 54641, *James Norton,* Matter of *vs. International Cork Co.,* State Industrial Commission, Sept. 22, 1915.

§ 15. Schedule in case of disability. The following schedule of compensation is hereby established:

1. Total permanent disability. In case of total disability adjudged to be permanent sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

Where the employee lost one hand in an accident and was totally disabled because of the fact that the other hand had been lost in an accident prior to the enactment

of the compensation law, it was held that the injured workman was entitled to compensation for total permanent disability instead of for a period of 244 weeks for the loss of one hand.

Schwab, Matter of *vs. Emporium Forestry Co.*, 167 App. Div. 614; 153 N. Y. Supp. 234; Aff. 216 N. Y. Memo. 712.

NOTE: This decision has no application as to any injury received subsequent to May 12, 1915, because of the amendment to subdivision 6 of this section (Chapter 615, Laws of 1915), under which in a case as above outlined the compensation is limited to the amount prescribed for the latter injury.

2. Temporary total disability. In case of temporary total disability, sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance thereof, but not in excess of three thousand five hundred dollars, except as otherwise provided in this chapter.

3. Permanent partial disability. In case of disability partial in character but permanent in quality the compensation shall be sixty-six and two-thirds per centum of the average weekly wages and shall be paid to the employee for the period named in the schedule as follows:

Thumb. For the loss of a thumb, sixty weeks.

First finger. For the loss of the first finger, commonly called index finger, forty-six weeks.

Second finger. For the loss of a second finger, thirty weeks.

Third finger. For the loss of a third finger, twenty-five weeks.

Fourth finger. For the loss of a fourth finger, commonly called the little finger, fifteen weeks.

Phalange of thumb or finger. The loss of the first phalange of the thumb or finger shall be considered to be equal to the loss of one-half of such thumb or finger, and compensation shall be one-half of the amount above specified. The loss of more than one phalange shall be considered as the loss of the entire thumb or finger; provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

Great toe. For the loss of a great toe, thirty-eight weeks.

Other toes. For the loss of one of the toes other than the great toe, sixteen weeks.

Phalange of toe. The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of said toe, and the compensation shall be one-half of the amount specified. The loss of more than one phalange shall be considered as the loss of the entire toe.

Hand. The loss of a hand, two hundred and forty-four weeks.

Arm. For the loss of an arm, three hundred and twelve weeks.

Foot. For the loss of a foot, two hundred and five weeks.

Leg. For the loss of a leg, two hundred and eighty-eight weeks.

Eye. For the loss of an eye, one hundred and twenty-eight weeks.

Loss of use. Permanent loss of the use of a hand, arm, foot, leg, eye, thumb, finger, toe, or phalange, shall be considered as the equivalent of the loss of such hand, arm, foot, leg, eye, thumb, finger, toe or phalange.

The amputation of one-third of the first phalange of a finger constitutes the loss of the phalange, and, therefore, the loss of half the finger:

Petrie, Matter of *vs. Oneida Steel Pulley Co.*, 151 N. Y. Supp. 307; 165 App. Div. 561; Aff. 215 N. Y. 335.

Where only the tip of the finger is amputated, an award cannot be made as for one-half the finger.

Mockler, Matter of *vs. Hawkes*, App. Div., Third Dept., May 2, 1916; opinion by Howard, J.

The loss of the first phalange and a portion of the second phalange is "the loss of more than one phalange" and authorizes an award for the loss of the entire finger.

Fortino, Matter of *vs. Merchants Desp. Trans. Co.*, —— App. Div. ——; 156 N. Y. Supp. 262.

Where the first phalange is amputated and the remainder of the finger rendered useless preventing the claimant from working, the compensation is limited to the amount provided for the loss of the entire finger.

Feinman, Matter of *vs. Albert Mfg. Co.*, 155 N. Y. Supp. 909; 170 App. Div. 147.

Where the injury to the finger results in ankylosis of the joints preventing the claimant from working, compensation is limited to the amount prescribed for the loss of the entire finger.

O'Neill, Matter of *vs. West Side Storage Warehouse* (decided with Matter of Feinman, above).

The effect of the decisions relating to injuries to fingers is to authorize an award for the loss of the finger where there is loss of use and to prevent an award for a greater amount although the claimant is disabled from working for a longer period of time than the number of weeks for which compensation is awarded for the loss of the finger.

Under the amendment made to this section in 1916, loss of the use of a thumb, finger, toe or phalange, is equal to the loss of the same.

What constitutes the loss of use is a question of fact to be determined by the Commission and in the following cases the award made for the loss of the use of a hand was affirmed:—

Where there was an amputation of the index, second and third fingers and the little finger mutilated.

Rockwell, Matter of *vs. Lewis*, 168 App. Div. 674; 154 N. Y. Supp. 893.

Where there was an injury to the hand, the amputation of the little finger and loss of use of the three remaining fingers.

Cunningham, Matter of *vs. Buffalo C. & B. Rolling Mills*, ——App. Div. ——; 155 N. Y. Supp. 797.

Where there was an amputation of two phalanges of the first finger, more than two phalanges of the second and third fingers and one phalange of the middle finger.

Grammici, Matter of *vs. Simon Zimm*, Aff. App. Div., Third Dept., March 8, 1916, two JJ. dissenting.

As no provision is made in this subdivision for the amputation of an ear, it was held that damages could be

recovered apart from the compensation law for such an injury.

Shinnick vs. Clover Leaf Farms, 169 App. Div. 236; 154 N. Y. Supp. 423; 152 N. Y. Supp. 649.

A view contrary to the decision in the Shinnick case was expressed by Supreme Court Justice Andrews in a decision handed down at Special Term March 22, 1916, in the case of *Michael Connors vs. Semet-Solvay Co.* (not yet reported).

The Shinnick case is no longer an authority for the recovery of damages for disfigurement as the amendment to this section, effective June 1, 1916, authorizes the Commission to make an award of compensation for disfigurement.

Where the claimant received an injury resulting in the loss of the leg and other serious injuries, compensation cannot be awarded for such other injuries concurrently with the award of 288 weeks for the loss of the leg.

Friedenburg, Matter of *vs. Empire United Railways*, 168 App. Div. 618; 154 N. Y. Supp. 351.

NOTE: Since the above decision the Commission has been making consecutive awards in cases where there is an amputation and other injuries and its decision in this respect has not as yet been passed upon by the Courts. For cases on appeal involving this point see *O'Connell vs. Modern Machine Tool Co.* (Feb. 26, 1916), and *Kossoff vs. R. H. Macy & Co.* (Feb. 10, 1916).

Where the other injuries result in disability beyond the period fixed for the amputation, compensation is payable for the entire period of disability, and in a case where the injury resulted in the loss of use of the third finger and general infection causing disability for a period of 52 weeks, an award was made for 25 weeks for the loss of the finger and for an additional period of 27 weeks for disability.

Claim No. 74369, *Bloomfield*, Matter of *vs. November*, Aff. 156 N. Y. Supp. 1116. (Without opinion.)

Where an award of 19 weeks was made for disability

due to an injury to the eye and the injury subsequently resulted in the loss of the use of the eye, the award of 19 weeks for disability was deducted from the award of 128 weeks made for the loss of the eye.

Kreppel, Matter of *vs. Boyland*, 2 N. Y. St. Dep. Rep. 489.

Amputations. Amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand. Amputation between the knee and the ankle shall be considered as the equivalent of the loss of a foot. Amputation at or above the elbow shall be considered as the loss of an arm. Amputation at or above the knee shall be considered as the loss of the leg.

The compensation for the foregoing specific injuries shall be in lieu of all other compensation, except the benefits provided in section thirteen of this chapter.

In case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars. (This paragraph added by L. 1916, Ch. 622, effective June 1, 1916.)

Other cases. In all other cases in this class of disability, the compensation shall be sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the commission on its own motion or upon application of any party in interest. (Subd. 3, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

4. Temporary partial disability. In case of temporary partial disability, except the particular cases mentioned in subdivision three of this section, an injured employee shall receive sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage earning capacity thereafter in the same employment or otherwise during the continuance of such partial disability, but not to exceed when combined with his decreased earnings the amount of wages he was receiving prior to the injury, and not to exceed in total the sum of three

thousand five hundred dollars, except as otherwise provided in this chapter. (Subd. 4 am'd by L. 1916, Ch. 622, effective June 1, 1916.)

5. Limitation. The compensation payment under subdivisions one, two and four and under subdivision three except in case of the los sof a hand, arm, foot, leg or eye, shall not exceed fifteen dollars per week nor be less than five dollars per week; the compensation payment under subdivision three in case of the loss of a hand, arm, foot, leg or eye, shall not exceed twenty dollars per week nor be less than five dollars a week; provided, however, that if the employees wages at the time of injury are less than five dollars per week he shall receive his full weekly wages.

The term "wages" as used in subdivision 5 means actual wages and not average weekly wages as determined by Section 14.

Morey, Matter of *vs. Worden*, 2 N. Y. St. Dep. Rep. 494.

An employee working for $1.20 per day in an employment carried on only 90 days during the year is entitled to the minimum compensation at the rate of $5 per week for the loss of an eye.

Morey, Matter of *vs. Worden*, above.

6. Previous disability. The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, provided, however, that an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability. (Subd. 6 am'd by L. 1915, Ch. 615.)

Where a foreman received an injury resulting in the loss of the use of an arm for which he received an award of compensation for 312 weeks but returned to work at the same salary and received another injury resulting in a fracture of the same arm which disabled him from working for 8 weeks, it was held that he was only en-

titled to the medical benefits prescribed by Section 13 for the second injury.

Claim No. 43636, *Thomas Marley*, Matter of *vs. Otis Elevator Company*, State Industrial Commission, March 27, 1916.

In a case where the claimant had lost a part of the distal phalange of the thumb in an accident fourteen years ago, and lost a part of the second phalange in the accident for which compensation was claimed, the award was made for 30 weeks as for one-half of the thumb. (In this case the first accident constituted the loss of one-half the thumb and the second accident constituted the loss of the entire thumb, but the compensation was limited under this subdivision to the later injury.)

Claim No. 13861. *Andrew J. Anderson*, Matter of *vs. American Mfg. Co.*, State Industrial Commission, March 20, 1916.

7. Permanent total disability after permanent partial disability. If an employee who has previously incurred permanent partial disability through the loss of one hand, one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed period of weeks special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of one hundred dollars. The state treasurer shall be the custodian of this special fund, and the commission shall direct the distribution thereof. (Subd. 7 added by L. 1916, Ch. 622, effective June 1, 1916.)

§ 16. Death benefits. If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

1. Reasonable funeral expenses not exceeding one hundred dollars.

An award of $100 to the brother-in-law of the deceased "for his services in the matter of funeral expenses and burial" of deceased was reversed in the absence of proof showing the payment of the amount or liability for the payment of the same.

File No. 575, *August Tirre*, deceased, *vs. Bush Terminal Co.*, St. Ind. Com. Oct. 27, 1915; App. Div., Third Dept., May 2, 1916, opinion by Lyon, J.

2. If there be a surviving wife (or dependent husband) and no child of the deceased under the age of eighteen years, to such wife (or dependent husband) thirty per centum of the average wages of the deceased during widowhood (or dependent widowerhood) with two years' compensation in one sum, upon remarriage; and if there be surviving child or children of the deceased under the age of eighteen years, the additional amount of ten per centum of such wages for each such child until of the age of eighteen years; in case of the subsequent death of such surviving wife (or dependent husband) any surviving child of the deceased employee, at the time under eighteen years of age, shall have his compensation increased to fifteen per centum of such wages, and the same shall be payable until he shall reach the age of eighteen years; provided that the total amount payable shall in no case exceed sixty-six and two-thirds per centum of such wages. The commission may in its discretion require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement by the commission the appointment of a guardian for such purposes shall not be necessary. (Subd. 2 am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Award of compensation may be made to a surviving wife who was married to the deceased employee subsequent to the date of the accident.

Claim No. 48329. *Crockett*, Matter of *vs. State Insurance Fund*, Appeal dismissed, 155 N. Y. Supp. 692. 170 App. Div. 122.

Where there is a surviving wife and children, the compensation for the children may be paid to the mother without the appointment of a guardian.

Woodcock, Matter of *vs. Walker*, 170 App. Div. 4; 155 N. Y. Supp. 702.

The common law wife of a deceased employee is a lawful surviving wife and entitled to compensation.

Claim No. 58081, *Ziegler*, Matter of *vs. P. Cassidy's Sons*. Aff. 155 N. Y. Supp. 1151. (Without opinion.)

For cases in which the facts do not establish a common law marriage, see

Chicchetti, Matter of *vs. Interborough Rapid Transit Co.*, The Bulletin, Vol. 1, No. 2, page 10.

Claim No. 70063, *Thomas J. McNeill*, deceased, *vs. F. Holman & Sons, Inc.*, State Industrial Commission, March 7, 1916. The Bulletin, Vol. 1, No. 6, page 4.

See also Matter of Hinman, 147 App. Div. 452, in which it was held that Chapter 742 of the Laws of 1907, which repealed Section 19 of the Domestic Relations Law as added by Chapter 339 of the Laws of 1901, restored common law marriages in New York State. This case was affirmed by the Court of Appeals (206 N. Y. 653) without that Court passing upon the validity of common law marriages.

3. If there be surviving child or children of the deceased under the age of eighteen years, but no surviving wife (or dependent husband) then for the support of each such child until of the age of eighteen years, fifteen per centum of the wages of the deceased, provided that the aggregate shall in no case exceed sixty-six and two-thirds per centum of such wages.

4. If there be no surviving wife (or dependent husband) or child under the age of eighteen years or if the amount payable to surviving wife (or dependent husband) and to children under the age of eighteen years shall be less in the aggregate than sixty-six and two-thirds per centum of the average wages of the deceased, then for the support of grandchildren or brothers and sisters under the age of eighteen years, if dependent upon the deceased at the time of the accident, fifteen per centum of such wages for the support of each such person until of the age of eighteen years; and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the accident, twenty-five per centum of such wages during such dependency. But in no case shall the aggregate amount

payable under this subdivision exceed the difference between sixty-six and two-thirds per centum of such wages, and the amount payable as hereinbefore provided to surviving wife (or dependent husband) or for the support of surviving child or children. (Subd. 4, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Any excess of wages over one hundred dollars a month shall not be taken into account in computing compensation under this section. All questions of dependency shall be determined as of the time of the accident.

The dependents of an unmarried employee are entitled to compensation.

Friscia, Matter of *vs. Drake Brothers Co.*, 153 N. Y. Supp. 392; 167 Aff. Div. 496.

Parents may be dependent upon the wages of a minor son.

Friscia, Matter of *vs. Drake Brothers Co.* (above).

A sister under 18 years of age is a dependent as well as the parents, where the wages of the deceased employee are paid to the parents for the support of the family.

Walz, Matter of *vs. Holbrook, Cabot & Rollins Corp.* 170 App. Div. 6; 155 N. Y. Supp. 703.

Both a mother and grandmother may receive compensation as dependents of one employee.

Claim No. 6522, *Ramsey*, Matter of *vs. Fairbanks Morse & Co.*, 155 N. Y. Supp. 1136.

Next of kin not included in this Section as dependents may sue for damages at common law.

Shanahan vs. Monarch Engineering Company, 156 N. Y. Supp. 143.

Dependency is a question of fact and the award will be affirmed where there is evidence supporting the findings of the Commission.

Rhyner, Matter of *vs. Huber Building Co.*, 171 App. Div. 71; 156 N. Y. Supp. 903.

Any degree of dependency is sufficient to support an award of compensation.

Walz, Matter of *vs. Holbrook, Cabot & Rollins Co.* (above).

Where the deceased employee was contributing to a fund to be used to purchase a house it was held that the mother and sister were not dependents.

Claim No. 32853. *Kolb*, Matter of *vs. Borden's Condensed Milk Co.*, 4 N. Y. St. Dep. Rep. 347; Aff. App. Div. Third Dept., May 2, 1916.

Awards are made to the dependents under Subdivision 4 "during dependency" and where it appeared that the father of the deceased was no longer dependent, the award of compensation was suspended.

Claim No. 50467, *George Klinger, Jr.*, Matter of *vs. J. Odell Whitenack*, State Industrial Commission, July 26, 1915.

Where the father of the deceased is a non-resident, proof of needy circumstances by affidavit, together with direct proof that the deceased was in the habit of sending funds to his father, is held sufficient to establish dependency.

Claim No. 30667, *Francesco P. Brio*, deceased, Matter of *vs. Carpenter, Boxley & Herrick*, The Bulletin, Vol. 1, No. 5, page 11.

Where the dependent is the mother of the deceased and lives in a foreign country, an award of compensation based solely on hearsay evidence to the effect that the deceased had sent money to his mother, was reversed.

File No. 575, *August Tirre*, deceased, *vs. Bush Terminal Co.*, St. Ind. Com., Oct. 27, 1915; App. Div., Third Dept., May 2, 1916, opinion by Lyon, J.

In making compensation to the dependents of a minor, the Commission may take into consideration the fact that his wages would be expected to increase. Determination of wages of the deceased does not involve a question of dependency.

Kilberg, Matter of *vs. V. S. Vitsch*, 171 App. Div. 89; 156 N. Y. Supp. 971.

§ 17. **Aliens.** Compensation under this chapter to aliens not residents (or about to become nonresidents) of the United States or Canada, shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child

or children, or, if there be no surviving wife or child or children, to surviving father or mother, or grandfather or grandmother, whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the accident, and except that the commission may, at its option, or upon the application of the insurance carrier, shall, commute all future installments of compensation to be paid to such aliens, by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the commission. (As am'd by L. 1916, Ch. 622, effective June 1, 1916.)

An alien receiving compensation for temporary total disability is entitled to full compensation notwithstanding the fact that he becomes a non-resident.

Williams, Matter of *vs. Electric Carbon Co.*, 4 N. Y. St. Dep. Rep. 489.

§ 18. **Notice of injury.** Notice of an injury for which compensation is payable under this chapter shall be given to the commission and to the employer within ten days after disability, and also in case of the death of the employee resulting from such injury, within thirty days after such death. Such notice may be given by any person claiming to be entitled to compensation, or by some one in his behalf. The notice shall be in writing, and contain the name and address of the employee and state in ordinary language the time, place, nature and cause of the injury, and be signed by him or by a person on his behalf or, in case of death, by any one or more of his dependents or by a person on their behalf. It shall be given to the commission by sending it by mail, by registered letter, addressed to the commission at its office. It shall be given to the employer by delivering it to him or sending it by mail, by registered letter, addressed to the employer at his or its last known place of residence; provided that, if the employer be a partnership then such notice may be so given to any one of the partners, and if the employer be a corporation, then such notice may be given to any agent or officer thereof upon whom legal process may be served, or any agent in charge of the business in the place where the injury occurred. The failure to give such notice, unless excused by the commission either on the ground that notice for some sufficient reason could not have been given, or on the ground

that the state fund, insurance company, or employer, as the case may be, has not been prejudiced thereby, shall be a bar to any claim under this chapter.

Where the accident happened in February and the claimant remained at work until June, when she stopped work because of the accident, at which time the claimant gave notice of injury, failure to give written notice within ten days was excused.

Claim No. 72766, *Gray*, Matter of *vs. De Jong*, Aff. App. Div., Third Dept., March 8, 1916. (Without opinion.)

Where the injured workman told her employer three days after the accident, that she had been injured, failure to give written notice was excused.

Claim No. 74369, *Bloomfield*, Matter of *vs. November*, Aff. 156 N. Y. Supp. 1116. (Without opinion.)

Where the injured workman failed to give written notice of injury until 77 days after the accident, but was treated for the injury by the company's physician, failure to give written notice under this section was excused.

File No. 5465, *Marrianicco*, Matter of *vs. Flinn-O'Rourke Company*, App. Div., Third Dept., May 2, 1916; opinion by Lyon, J.

§ 19. **Medical examination.** An employee injured claiming or entitled to compensation under this chapter shall, if requested by the commission, submit himself for medical examination at a time, and from time to time, at a place reasonably convenient for the employee, and as may be provided by the rules of the commission. If the employee or the insurance carrier request he shall be entitled to have a physician or physicians of his own selection to be paid by him present to participate in such examination. If an employee refuse to submit himself to examination, his right to prosecute any proceeding under this chapter shall be suspended, and no compensation shall be payable, for the period of such refusal.

§ 20. **Determination of claims for compensation.** At any time after the expiration of the first fourteen days of disability on the part of an injured employee, or at any time after his death, a claim for compensation may be

presented to the employer and if rejected or if within ten days after presentation, a report containing an agreement for compensation be not made and filed with the commission as provided by this section, the claim may be presented to the commission. The commission shall have full power and authority to determine all questions in relation to the payment of claims presented to it for compensation under the provisions of this chapter. The commission shall make or cause to be made such investigations as it deems necessary, and upon application of either party, shall order a hearing, and within thirty days after a claim for compensation is submitted under this section, or such hearing closed, shall make or deny an award, determining such claim for compensation, and file the same in the office of the commission, together with a statement of its conclusions of fact and rulings of law. The commission may before making an award, require the claimant to appear before an arbitration committee appointed by it and consisting of one representative of employees, one representative of employers, and either a member of the commission or a person specially deputized by the commission to act as chairman, before which the evidence in regard to the claim shall be adduced and by which it shall be considered and reported upon. Immediately after such filing the commission shall send to the parties a copy of the decision. Upon a hearing pursuant to this section either party may present evidence and be represented by counsel. The decision of the commission shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law. When a claim is presented to an employer, and the employer and employee, or in case of death, his principal dependent, enter into an agreement for the payment of compensation therefor pursuant to this chapter, a joint report of such claim containing such agreement shall be made to the commission upon a form prepared by it and signed by the employer and employee, or in case of death his principal dependent. The commission shall examine such report and approve the same when the terms are strictly in accordance with this chapter and such approval shall constitute an award. However, the commission may make an award in the manner provided in this scetion in any case, and if the terms of the award vary from the joint report, the employer shall comply with the award. In case of unfair dealing or of bad faith on the part of the

employer under this section, the commission may impose a penalty of not more than ten per centum of the award. (As am'd by L. 1915, Ch. 167.)

The decision of the Commission upon a question of fact is final and the award will be affirmed where there is any evidence supporting the findings of the Commission.

Goldstein, Matter of *vs. Center Iron Works*, 167 App. Div. 526; 153 N. Y. Supp. 224.

Dale, Matter of *vs. Saunders Bros.*, 218 N. Y. 59, 63, (Court of Appeals, April 25, 1916).

Where the evidence was conflicting as to whether the death of the injured workman was caused by a fall, by an electric shock, or from natural causes, the finding of the Commission that death was due to an electric shock will not be disturbed.

Claim No. 24887, *Broleski*, Matter of *vs. Nichols Copper Co.*, Aff. 155 N. Y. Supp. 1096. (Without opinion.)

Upon an appeal from an award the Court may examine the evidence to supplement the findings of fact made by the Commission.

Gleisner, Matter of *vs. Gross & Herbener*, 170 App. Div. 87; 155 N. Y. Supp. 946.

Whether there is any evidence supporting a finding of fact as made by the Commission remains a question of law and the award will be reversed where there is no such evidence.

Collins, Matter of *vs. Brooklyn Union Gas Co.*, 171 App. Div. 381; 156 N. Y. Supp. 957.

Gleisner, Matter of *vs. Gross & Herbener*, above.

An award of compensation was reversed and the case remanded to the Commission for further hearing where the insurance carrier was denied an opportunity to cross-examine the claimant.

Claim No. 6522, *Ramsey*, Matter of *vs. Fairbanks Morse & Co.*, 155 N. Y. Supp. 1136.

It seems that the Court has power to reverse the award and direct a further hearing where the Commission denies an application to re-open the case for the purpose of taking additional testimony.

Dearborn, Matter of *vs. Peugeot Auto Import Co.*, 170 App. Div. 93; 155 N. Y. Supp. 769.

An award made upon the consent of a representative of the insurance carrier will not be disturbed upon appeal.

Cunningham, Matter of *vs. Buffalo C. & B. Rolling Mills*, —— App. Div. ——; 155 N. Y. Supp. 797.

If there are no facts and the decision of the Commission is arbitrary, unfair and unreasonable, a question of law arises which may be determined by the Courts.

Rhyner, Matter of *vs. Huber Bldg. Const. Co.*, 171 App. Div. 71; 156 N. Y. Supp. 903.

When the findings of the Commission are without evidence and in direct conflict with the undisputed facts, and all reasonable inference which may be drawn from them, its determination may be reversed as error of law.

Gardner, Matter of *vs. Horsehead's Construction Co.*, 171 App. Div. 66; 156 N. Y. Supp. 899.

§ 20-a. Payments of moneys in advance of award by commission. Any employer shall upon the making of the agreement provided for in section twenty advance to any injured employee or to the principal dependent of a deceased employee, the payment or payments provided for in the agreement, in return for which he shall receive a receipt on a form supplied by the commission and signed by the person receiving the money, which receipt shall specifically state in what capacity the signer acted while so receiving such money; such receipt shall be forwarded to the commission within forty-eight hours after date of its issuance and the sum stated on its face shall be returned to said employer as provided in section twenty-five.

Prior to the making of said agreement or in the event of no agreement, any employer may at his option advance to any injured employee or to the principal dependent of a deceased employee any sum of money, in return for which he shall receive a receipt on a form supplied by the commission and signed by the person receiving the money, which receipt shall specifically state in what capacity the signer acted while so receiving such money; such receipt shall be forwarded to the commission within forty-eight hours after date of its issuance. Should any agreement

or award be made the sum so stated on the face of the receipt shall be credited to the payment under the award or agreement and shall be repaid as hereinbefore provided. Any money so advanced shall be at the employer's risk. (Added by L. 1915, Ch. 168.)

§ 21. Presumptions. In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary

1. That the claim comes within the provisions of this chapter;

2. That sufficient notice thereof was given;

3. That the injury was not occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another;

4. That the injury did not result solely from the intoxication of the injured employee while on duty.

Where the employer fails to report all the facts the Commission is justified in assuming that the injury was due to a hazardous employment.

McQueeney, Matter of *vs. Sutphen & Meyer*, 167 App. Div. 528; 153 N. Y. Supp. 554.

Kohler, Matter of *vs. Frohmann*, 167 App. Div. 533; 153 N. Y. Supp. 559.

Larsen, Matter of *vs. Paine Drug Co.*, —— N. Y. ——, (Ct. of Appeals, May 12, 1916, opinion by Hiscock, J.)

There must be evidence that the claimant met with an accident which arose out of and in the course of the employment before the presumptions created by this section will apply.

Collins, Matter of *Brooklyn Union Gas Co.*, 171 App. Div. 381; 156 N. Y. Supp. 957.

The Commission will require evidence, either direct or circumstantial, that the accident happened, before the presumption established by the statute can arise.

Jas. J. Hiland, deceased, Matter of *vs. D. Winant, Inc.*, The Bulletin, Vol. 1, No. 2, pp. 9, 10.

"The presumption raised by Section 21 of the Act that the case comes within the Act does not permit the words of the statute to be warped from their usual and ordinary meaning. It relates more to the facts: as far as it affects

the construction of the statute itself it can only be material as indicating that the statute is a remedial one and should be given a liberal construction in order to carry out the beneficial purposes intended to be accomplished by the Law."

Tomassi, Matter of *vs. Christensen*, 171 App. Div. 284; 156 N. Y. Supp. 905.

§ 22. **Modification of award.** Upon its own motion or upon the application of any party in interest, on the ground of a change in conditions, the commission may at any time review any award, and, on such review, may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall state its conclusions of fact and rulings of law, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys already paid. (See also Section 74.)

§ 23. **Appeals from the commission.** An award or decision of the commission shall be final and conclusive upon all questions within its jurisdiction, as against the state fund or between the parties, unless within thirty days after a copy of such award or decision has been sent to the parties, an appeal be taken to the appellate division of the supreme court of the third department. The commission may also, in its discretion, on the application of either party, certify to such appellate division of the supreme court, questions of law involved in its decision. Such appeals and the questions so certified shall be heard in a summary manner and shall have precedence over all other civil cases in such court. The commission shall be deemed a party to every such appeal, and the attorney-general, without extra compensation, shall represent the commission thereon. An appeal may also be taken to the court of appeals in all cases where the decision of the appellate division is not unanimous and by the consent of the appellate division or a judge of the court of appeals where the decision of the appellate division is unanimous in the same manner and subject to the same limitations not inconsistent herewith as is now provided in civil actions. It shall not be necessary to file exceptions to the rulings of the commission. The commission shall not be required to file a bond upon an appeal by it to the court of appeals.

Otherwise such appeals shall be subject to the law and practice applicable to appeals in civil actions. Upon the final determination of such an appeal, the commission shall make an award or decision in accordance therewith. (Sec. 23, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

Upon an appeal from an award made by the Commission, the compensation law will be liberally construed.

Petrie, Matter of *vs. Oneida Steel Pulley Co.*, 165 App. Div. 561; 151 N. Y. Supp. 307; 215 N. Y. 335.

Rheinwald, Matter of *vs. Builders Brick & Supply Co.*, 168 App. Div. 425; 153 N. Y. Supp. 598.

Smith, Matter of *vs. Price*, 168 App. Div. 421; 153 N. Y. Supp. 221.

Where the decision of the Appellate Division is unanimous, the appeal cannot be taken to the Court of Appeals except with the permission either of the Appellate Division or a judge of the Court of Appeals.

Harnett, Matter of *vs. Thos. J. Steen Co.*, 216 N. Y. 101.

Employers insured in the State Fund cannot appeal from a decision of the Commission making award of compensation against the State Insurance Fund.

Crockett, Matter of *vs. State Insurance Fund*, 170 App. Div. 122; 155 N. Y. Supp. 692.

In view of the fact that the Compensation Law is similar in many respects to the English act, much consideration will be given to decisions by English Courts in compensation cases.

Newman, Matter of *vs. Newman*, 169 App. Div. 745; 155 N. Y. Supp. 665.

DePhillippis, Matter of *vs. Faulkenberg*, 170 App. Div. 153; 155 N. Y. Supp. 761.

(The citations of cases in this work in the New York Supplement Reports (without opinion) are decisions of the Appellate Division, Supreme Court, Third Department on appeals from awards under this section. Where opinions have been written both the Appellate Division and the New York Supplement citations are given.)

RULES ADOPTED BY THE APPELLATE DIVISION, THIRD DEPARTMENT, REGULATING APPEALS IN COMPENSATION CASES.

Rule 1. * * * Appeals in compensation cases shall be put upon the compensation appeals calendar immediately following the non-enumerated calendar. The argument of * * * such * * * cases will be heard only upon the first day of a term and the days immediately following, until they shall all be disposed of, before the general calendar shall be taken up. But submission of such appeals will be received on any day during the term. Appeals from orders and compensation appeals which are not upon the calendar when printed, may, after papers have been filed and served in compliance with General Rule No. 41, be added thereto upon filing a note of issue with the clerk five days before argument, and be noticed for argument for any Tuesday of the term upon the usual notice of eight days. (Adopted January 18, 1916.)

The argument of a case on the general calendar will not be required in any case before Wednesday of the first week.

Appeals from the Appellate Division are heard in the Court of Appeals under Rule 11 of the Rules of the Court of Appeals relating to appeals from orders.

Exception to decisions of the Commissions are not necessary for the purpose of reviewing questions on appeal.

Kenny, Matter of *vs. Union Railway Co.*, 166 App. Div. 497; 152 N. Y. Supp. 117.

§ 24. Costs and fees. If the commission or the court before which any proceedings for compensation or concerning an award of compensation have been brought, under this chapter, determines that such proceedings have not been so brought upon reasonable ground, it shall assess the whole cost of the proceeding upon the party who has so brought them. Claims for legal services in connection with any claim arising under this chapter, and claims for services or treatment rendered or supplies furnished pursuant to section thirteen of this chapter, shall not be enforceable unless approved by the commission. If so approved, such claim or claims shall become a lien upon the compensation awarded, but shall be paid therefrom only in the manner fixed by the commission.

§ 25. Compensation, how payable. Compensation under the provisions of this chapter shall be payable periodically by the employer, in accordance with the method of payment of the wages of the employee at the time of his injury or death, and shall be so provided for in any award; but the commission may determine that any payments may be made monthly or at any other period, as it may deem advisable. The state or insurance corporation in which an employer is insured shall, within ten days after demand by such employer and on the presentation of evidence of payment of compensation in accordance with this chapter, reimburse the employer therefor. An injured employee, or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall forward receipts therefor promptly to the commission. The commission, whenever it shall so deem advisable, may commute such periodical payments to one or more lump sum payments to the injured employee or, in case of death, his dependents, provided the same shall be in the interest of justice. (As am'd by L. 1915, Ch. 167.)

§ 26. Enforcement of payment in default. If payment of compensation, or an instalment thereof, due under the terms of an award, be not made by the employer within ten days after the same is due, the insurance carrier shall be liable therefor and if not paid within ten days after demand by the injured employee or in case of death his dependents or by the commission, the amount of such payment shall constitute a liquidated claim for damages against the employer, self-insurer or insurance corporation, which with an added penalty of fifty per centum may be recovered in an action to be instituted by the commission in the name of the people of the state. An employer who negligently or intentionally defaults in payment of compensation in the first instance under this chapter shall be liable to a penalty of not more than ten per centum of the amount of such compensation, notwithstanding the fact that the insurance corporation or state fund subsequently pays the compensation as provided in this section. If such default be made in the payment of an instalment of compensation and the whole amount of such compensation be not due, the commission may, if the present value of such compensation be computable, declare the whole amount

thereof due, and recover the amount thereof with the added penalties, as provided by this section. Any such action may be compromised by the commission or may be prosecuted to final judgment as, in the discretion of the commission, may best serve the interests of the persons entitled to receive the compensation or the benefits. Compensation recovered under this section shall be disbursed by the commission to the persons entitled thereto in accordance with the award. A penalty recovered pursuant to this section shall be paid into the state treasury, and be applicable to the expenses of the commission.

In case of default by the employer in the payment of any compensation due under an award for the period of thirty days after payment is due and payable, any party in interest may file with the county clerk for the county in which the injury occurred, a certified copy of a decision of the state industrial commission awarding compensation, or ending, diminishing or increasing compensation previously awarded, from which no appeal has been taken within the time allowed therefor, and thereupon judgment must be entered in the supreme court by the clerk of such county in conformity therewith immediately upon the filing of such decision. Such decree or judgment shall be entered in the same manner and shall have the same effect and all proceedings in relation thereto shall thereafter be the same, as though said decree or judgment had been rendered in a suit duly heard and determined by the supreme court, except that there shall be no appeal therefrom. The court upon the filing with it of a certified copy of a decision of the state industrial commission ending, diminishing or increasing compensation previously awarded, shall revoke or modify its prior decree or judgment so that it will conform to said decision. Neither the commission nor any party in interest shall be required to pay any fee to any public officer for filing or recording any paper or instrument executed in pursuance of this section. (Sec. 26, am'd by L. 1916, Ch. 622, effective June 1, 1916, and as amended by L. 1915, Ch. 167.)

§ 27. **Depositing future payments.** If an award under this chapter requires payment of compensation by an employer or an insurance corporation in periodical payments, and the nature of the injury makes it possible to compute the present value of all future payments with due regard for life contingencies, the commission may, in its discretion,

at any time, compute and permit or require to be paid into the state fund an amount equal to the present value of all unpaid compensation for which liability exists, together with such additional sum as the commission may deem necessary for a proportionate payment of expenses of administering the fund so created, such moneys to constitute an aggregate trust fund; and thereupon such employer or insurance corporation shall be discharged from any further liability under such award and payment of the same shall be assumed by the trust fund so created.

The moneys so paid into this fund shall constitute an aggregate trust fund and shall be kept separate and apart from all other moneys of the state fund, and shall not be liable for any expenses of administration of the state fund other than the expenses involved in the administration of such trust fund. (As amended by L. 1916, Ch. 622, effective June 1, 1916.)

§ 28. Limitation of right to compensation. The right to claim compensation under this chapter shall be forever barred unless within one year after the injury or if death result therefrom, within one year after such death, a claim for compensation thereunder shall be filed with the commission.

§ 29. Subrogation to remedies of employees. If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commission may by rule or regulation prescribe. If he elect to take compensation under this chapter, the cause of action against such other shall be assigned to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person, association, corporation, or insurance carrier, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case. Such a cause

of action assigned to the state may be prosecuted or compromised by the commission. A compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the commission, if the deficiency of compensation would be payable from the state insurance fund, and otherwise with the written approval of the person, association, corporation, or insurance carrier liable to pay the same. Wherever an employee is killed by the negligence or wrong of another not in the same employ and the dependents of such employee entitled to compensation under this chapter are minors, such election to take compensation and the assignment of the cause of action against such other and such notice of election to pursue a remedy against such other shall be made by such minor, or shall be made on behalf of such minor by a parent of such minor, or by his or her duly appointed guardian, as the commission may determine by rule in each case. (Sec. 29, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

An employee entitled to compensation under the workmen's compensation act may recover an award notwithstanding he has executed a release to another not in the same employ, through whose instrumentality the accident occurred.

An insurer in such case would be liable only for the difference between any amount received in consideration of the release and the compensation provided by the act.

The release in such case constitutes no obstacle in the way of the insurer prosecuting the assigned claim of the injured employee against the third party.

Woodward, Matter of *vs. E. W. Conklin & Sons, Inc.*, App. Div., Third Dept., March 8, 1916. Opinions by Cochrane and Woodward, JJ. (157 N. Y. Supp. 948.)

The injured workman may sue a third party for damages at common law without complying with the provisions of this section.

Lester vs. Otis Elevator Company, 153 N. Y. Supp. 1058; 169 App. Div. 613.

In a suit brought by an employer or insurance carrier upon the assigned claim of an injured workman, the re-

covery is limited to the amount of compensation paid by the plaintiff.

U. S. Fidelity & Guaranty Co. vs. New York Railways Co., 156 N. Y. Supp. 615.

It seems that where the injured workman is under 21 years of age such workman may sue or may elect to take compensation under this section without the appointment of a guardian *Ad Litem.*

Herkey, Matter of *vs. Agar Mfg. Co.*, 153 N. Y. Supp. 369; 90 Misc. 457.

In Death File No. 9, *James J. Cahill,* deceased, *vs. Terry & Trench Co.,* where the widow elected to sue a third party for damages and the mother elected to take compensation, the Commission has certified to the Appellate Division the question as to whether the mother is entitled to compensation.

Where a claim for compensation was filed and an award made to the dependents, permission to withdraw the claim in order that suit might be instituted against a third party was denied.

Claim No. 52472, *Peter Biovanni*, deceased, *vs.* New *England S. S. Co.*, State Industrial Commission.

Although the employer has secured the payment of compensation for injured employees and their dependents, an employee has a remedy at common law against a master as a third party for an injury sustained in the course of the employment while delivering goods at a building owned by the employer but entirely disconnected with the place of business where such injuries are caused by the employer's negligence.

Winter vs. Peter Doelger Brewing Co., —— Misc. ——; —— N. Y. Supp. ——, (Sup. Ct. App. Term, May, 1916).

Where a widow as administratrix brought suit against a third party resulting in a disagreement by the jury, compensation was denied against the employer and insurance carrier until the suit should be finally determined.

Claim No. 34155, *Govan Easter*, deceased, Matter of *vs. Washington Heights Van Co.*, Workmen's Compensation Com., May 3, 1915.

Where the injured workman has received an award of compensation, he cannot subsequently sue a third party, through whose negligence the injury happened.

Miller vs. New York Railways Company, 171 App. Div. 316; 157 N. Y. Supp. 200.

(See also Part I, Sec. 24.)

§ 30. Revenues or benefits from other sources not to affect compensation. No benefits, savings or insurance of the injured employee, independent of the provisions of this chapter, shall be considered in determining the compensation or benefits to be paid under this chapter, except that, in case of the death of an employee of the state, a municipal corporation or any other political subdivision of the state, any benefit payable under a pension system which is not sustained in whole or in part by the contributions of the employee, may be applied toward the payment of the death benefit provided by this chapter. (Section 30 am'd by L. 1914, Ch. 316.)

§ 31. Agreement for contribution by employee void. No agreement by an employee to pay any portion of the premium paid by his employer to the state insurance fund or to contribute to a benefit fund or department maintained by such employer or to the cost of mutual insurance or other insurance, maintained for or carried for the purpose of providing compensation as herein required, shall be valid, and any employer who makes a deduction for such purpose from the wages or salary of any employee entitled to the benefits of this chapter shall be guilty of a misdemeanor.

§ 32. Waiver agreements void. No agreement by an employee to waive his right to compensation under this chapter shall be valid.

(See *Cunningham,* Matter of *vs. Buffalo C. & B. Rolling Mills,* —— App. Div. ——; 155 N. Y. Supp. 797, where the Commission made an award for 244 weeks for the loss of a hand and disregarded a subsequent agreement signed by the claimant to accept a lump sum based upon compensation for 116 weeks for the loss of four fingers.

§ 33. Assignment; exemptions. Claims for compensation or benefits due under this chapter shall not be assigned, released or commuted except as provided by this

chapter, and shall be exempt from all claims of creditors and from levy, execution and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived. Compensation and benefits shall be paid only to employees or their dependents.

For a discussion of this section in connection with the settlement of a suit against a third party under Section 29, see

Woodward, Matter of *vs. E. W. Conklin & Sons, Inc.*, App. Div., Third Dept., March 8, 1916; (157 N. Y. Supp. 948.)

(See also, *Bloom vs. Jaffee*, 157 N. Y. Supp. 926; 94 Misc. 222.)

§ 34. Preferences. The right of compensation granted by this chapter and any awards made thereunder shall have the same preference or lien without limit of amount against the assets of the employer as is now or hereafter may be allowed by law for a claim for unpaid wages for labor. (As amended by L. 1916, Ch. 622, effective June 1, 1916.)

ARTICLE 3.

SECURITY FOR COMPENSATION.

Section 50. Security for payment of compensation.
51. Posting of notice regarding compensation.
52. Effect of failure to secure compensation.
53. Release from all liability.
54. The insurance contract.

§ 50. Security for payment of compensation. An employer shall secure compensation to his employees in one of the following ways:

1. By insuring and keeping insured the payment of such compensation in the state fund, or

2. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state. If insurance be so effected in such a corporation or mutual association the employer shall forthwith file with the commission, in form prescribed by it, a notice specifying the name of such insurance corporation or mutual association and such information regarding the policies as the commission may

require. (Subd. 2, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

3. By furnishing satisfactory proof to the commission of his financial ability to pay such compensation for himself, in which case the commission may, in its discretion, require the deposit with the commission of securities of the kind prescribed in section thirteen of the insurance law, in an amount to be determined by the commission, to secure his liability to pay the compensation provided in this chapter. The commission shall have the authority to revoke its consent furnished under this section at any time for good cause shown. (Subd. 3 am'd by L. 1916, Ch. 622, effective June 1, 1916.)

If an employer fail to comply with this section, he shall be liable to a penalty during which such failure continues of an amount equal to the pro rata premium which would have been payable for insurance in the state fund for such period for noncompliance to be recovered in an action brought by the commission.

The commission may, in its discretion, for good cause shown, remit any such penalty, provided the employer in default secure compensation as provided in this section. (Am'd by L. 1914, Ch. 316.)

All employees and employers must be treated alike to matter what method may be observed for giving security for the payment of compensation.

McQueeney, Matter of *vs. Sutphen & Meyer*, 167 App. Div. 528; 153 N. Y. Supp. 554.

Post, Matter of *vs. Burger & Gohlke*, 168 App. Div. 403; 153 N. Y. Supp. 505.

§ 51. **Posting of notice regarding compensation.** Every employer who has complied with section fifty of this chapter shall post and maintain in a conspicuous place or places in and about his place or places of business typewritten or printed notices in form prescribed by the commission, stating the fact that he has complied with all the rules and regulations of the commission and that he has secured the payment of compensation to his employees and their dependents in accordance with the provisions of this chapter.

§ 52. **Effect of failure to secure compensation.** Failure to secure the payment of compensation shall constitute a misdemeanor and have the effect of enabling the injured

employee, or in case of death, his dependents or legal representatives, to maintain an action for damages in the courts, as prescribed by section eleven of this chapter. (Sec. 52, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

§ 53. **Release from all liability.** An employer securing the payment of compensation by contributing premiums to the state fund shall thereby become relieved from all liability for personal injuries or death sustained by his employees, and the persons entitled to compensation under this chapter shall have recourse therefor only to the state fund and not to the employer. An employer shall not otherwise be relieved from the liability for compensation prescribed by this chapter except by the payment thereof by himself or his insurance carrier.

This section only releases from the liability to pay compensation. (See Part 2, Section 30.)

Employers who carry their own insurance or who insure with a stock or mutual company, upon payment of compensation, obtain the same release from liability as employers who insure in the State Fund.

Post, Matter of *vs. Burger & Gohlke*, 216 N. Y. 544.

Michael Connors vs. Semet-Solvay Company, Sup. Ct., Sp. Term, March 22, 1916 (not yet reported).

§ 54. **The insurance contract.** 1. Right of recourse to the insurance carrier. Every policy of insurance covering the liability of the employer for compensation issued by a stock company or by a mutual association authorized to transact workmen's compensation insurance in this state shall contain a provision setting forth the right of the commission to enforce in the name of the people of the state of New York for the benefit of the person entitled to the compensation insured by the policy either by filing a separate application or by making the insurance carrier a party to the original application, the liability of the insurance carrier in whole or in part for the payment of such compensation; provided, however, that payment in whole or in part of such compensation by either the employer or the insurance carrier shall to the extent thereof be a bar to the recovery against the other of the amount so paid.

2. Knowledge and jurisdiction of the employer extended to cover the insurance carrier. Every such policy shall contain a provision that, as between the employee and the insurance carrier, the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the insurance carrier; that jurisdiction of the employer shall, for the purpose of this chapter, be jurisdiction of the insurance carrier and that the insurance carrier shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the employer for the payment of compensation under the provisions of this chapter.

3. Insolvency of employer does not release the insurance carrier. Every such policy shall contain a provision to the effect that the insolvency or bankruptcy of the employer shall not relieve the insurance carrier from the payment of compensation for injuries or death sustained by an employee during the life of such policy.

4. Limitation of indemnity agreements. Every contract or agreement of an employer the purpose of which is to indemnify him from loss or damage on account of the injury of an employee by accidental means, or on account of the negligence of such employer or his officer, agent or servant, shall be absolutely void unless it shall also cover liability for the payment of the compensation provided for by this chapter.

5. Cancellation of insurance contracts. No contract of insurance issued by an insurance carrier against liability arising under this chapter shall be cancelled within the time limited in such contract for its expiration until at least ten days after a notice of cancellation of such contract, on a date specified in such notice, shall be filed in the office of the commission and also served on the employer. Such notice shall be served on the employer by delivering it to him or by sending it by mail, by registered letter, addressed to the employer at his or its last known place of residence; provided that, if the employer be a partnership, then such notice may be so given to any one of the partners, and if the employer be a corporation then the notice may be given to any agent or officer of the corporation upon whom legal process may be served. Provided, however, the right to cancellation of a policy of insurance in the state fund shall be exercised only for non-payment of

premiums. (Subd. 5, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

6. Any insurance carrier may issue policies, including with employees, employers who perform labor incidental to their occupations, such policies insuring to such employers the same compensations provided for their employees, and at the same rates; provided, however, that the estimation of their wage values, respectively, shall be reasonable and separately stated in and added to the valuation of their pay rolls upon which their premium is computed. The employer so insured shall have the same rights and remedies given an employee by this chapter. (Subd. 6, added by L. 1916, Ch. 622, effective June 1, 1916.)

In a proceeding before the Commission where a claim for compensation is made against the employer and insurance carrier, the Commission has jurisdiction to determine whether the insurance policy was in force at the time of the accident.

Bloom, Matter of *vs. Tillen & Bleek*, The Bulletin, Vol. 1, No. 2, page 12.

File No. 5091, *Miner*, Matter of *vs. Turnbull*, The Bulletin, Vol. 1, No. 6, page 21.

For cases in which the Commission determined that the insurance policy had not been properly cancelled, see

McCaffrey, Matter of *vs. Tager Contracting Co.*, The Bulletin, Vol. 1, No. 2, page 11.

File No. 5091, *Miner*, Matter of *vs. Turnbull*, The Bulletin, Vol. 1, No. 6, page 21.

For a case in which the Commission determined that the policy had been properly cancelled and was not in force at the time of the accident, see

Bloom, Matter of *vs. Tillen & Bleek*, above.

The insurance company can succeed in escaping liability under a policy that has been issued only by proof that the statutory method of cancellation was literally followed, or that the notice was in fact received by the insured.

File No. 5091, *Miner*, Matter of *vs. Turnbull*, above.

See also Death File No. 523, *Stanilaw Skoczylois*, deceased, *vs. Phillip Vinocour*, The Bulletin, Vol. 1, No. 6, page 14.

ARTICLE 4.

STATE WORKMEN'S COMPENSATION COMMISSION.

Section 60. State workmen's compensation commission.
61. Secretary, deputies and other employees.
62. Salaries and expenses.
63. Office.
64. Sessions of commission.
65. Powers of individual commissioners and deputy commissioners.
66. Powers and duties of secretary.
67. Rules.
68. Technical rules of evidence or procedure not required.
69. Issue of subpoena; penalty for failure to obey.
70. Recalcitrant witnesses punishable as for contempt.
71. Fees and mileage of witness.
72. Depositions.
73. Transcript of stenographer's minutes; effect as evidence.
74. Jurisdiction of commission to be continuing.
75. Report of commission.
76. Commission to furnish blank forms.
77. Expenses of administering commission.

(Sections 60 of the Workmen's Compensation Law which created the State Workmen's Compensation Commission, and 61, authorizing the appointment of secretaries, deputies and other employees were repealed by Chapter 674 of the Laws of 1915, and the functions of the State Workmen's Compensation Commission were transferred to the State Industrial Commission. In place of Sections 60 and 61 of the Workmen's Compensation Law there is inserted Section 40 of the Labor Law, being Chapter 36 of the Laws of 1909 as amended, constituting Chapter 31 of the Consolidated Laws, and Sections 4, 6 and 7 of Chapter 674 of the Laws of 1915. The State Industrial Commission superseded the Workmen's Compensation Commission on June 1, 1915.)

§ 40. (The Labor Law) Industrial commission created. There shall be a department of labor, the head of which shall be the industrial commission. The commission shall consist of five commissioners appointed by the governor by and with the advice and consent of the senate, one of whom shall be designated by the governor as chairman. Upon the appointment of a successor to the chairman the governor shall designate such successor or any member of the commission as chairman thereof. The term of office of each commissioner shall be six years, except that the term of the commissioners first appointed shall expire, one on January first, nineteen hundred and seventeen, one on January first, nineteen hundred and eighteen, one on January first, nineteen hundred and nineteen, one on January first, nineteen hundred and twenty and one on January first, nineteen hundred and twenty-one. Their successors shall be appointed for full terms of six years from the expiration of the terms of their predecessors in office. If a vacancy occurs otherwise than by expiration of a term, it shall be filled by appointment for the unexpired term. Each commissioner shall receive an annual salary of eight thousand dollars, and shall devote his entire time to the duties of his office. Not more than three commissioners shall be members of the same political party.

The governor may remove a commissioner for inefficiency, neglect of duty or misconduct in office, giving him a copy of the charges and an opportunity of being publicly heard in person or by counsel on not less than ten days' notice. If the commissioner be removed, the governor shall file in the office of the secretary of state a complete record of his proceedings with regard to such removal and his findings thereon.

The commission may adopt a seal and require that it be used for the authentication of the commission's orders and proceedings and for such other purposes as the commission may prescribe. The court shall take judicial notice of such seal and of the signatures of the chairman and secretary of the commission. (As am'd by L. 1911, Ch. 729; L. 1913, Ch. 145; and L. 1915, Ch. 674.)

§ 4. (Chapter 674, Laws of 1915) Workmen's Compensation Commission abolished. The State Workmen's Compensation Commission created as provided in Sec. 60 of the Workmen's Compensation Law is hereby abolished, and the terms of office of the members of such commission

then in office shall cease on the appointment and qualifications of the member of the Industrial Commission. All the powers, duties, obligations and liabilities conferred or imposed by law upon the Workmen's Compensation Commission by the Workmen's Compensation law or any other statute are hereby conferred and imposed upon the State Industrial Commission and such Commission may exercise and perform such powers and duties and shall be subjection to such obligations and liabilities in the same manner, to the same extent and with the same force and effect as would have been the case had the Workmen's Compensation Commission been continued in office. For the purpose of exercising such powers, performing such duties, being subjected to such obligations and liabilities, the State Industrial Commission shall be deemed to be a continuation of such Workmen's Compensation Commission. The offices of the secretary to the Workmen's Compensation Commission and of the deputies appointed by the Workmen's Compensation Commission, are hereby abolished; and the powers and duties of such officers then in office shall cease upon the appointment and qualifications of the members of the Industrial Commission.

§ 6. (Chapter 674, Laws of 1915) Rules and Regulations continued; pending actions or proceedings. The rules, regulations and orders of the commissioner of labor, the industrial board, or the Workmen's Compensation Commission in force when this act takes effect enacted or promulgated pursuant to law are continued in full force and shall be operative until modified, superseded or repealed by the Industrial Commission. This act shall not affect pending cases or proceedings, civil or criminal, brought by or against the commissioner of labor or the Workmen's Compensation Commission. All proceedings, hearings, investigations and other matters pending before the commissioner of labor, the industrial board, or the Workmen's Compensation Commission shall be continued and brought to a final determination before the Industrial Commission in the same manner as though the commissioner of labor, the industrial board and the Workmen's Compensation Commission had been continued in office. Any award or determination made by the Workmen's Compensation Commission prior to the taking effect of this act shall have the same force and effect as though the Workmen's Compensation Commission had been continued in office.

§ 7. (Chapter 674, Laws of 1915) Construction. Whenever the term "department of labor," "commissioner of labor," "industrial board," or Compensation Commission" occurs in any law or in any rule or regulation made in pursuance of law, or whenever in any law reference is made to such department, commissioner or board, commission or officer, such terms or reference shall be deemed to mean the Industrial Commission as established by this act.

§ 62. Expenses. The commission may make the necessary expenditure to obtain statistical and other information to establish classifications of employments with respect to hazards and risks. The expenses of the commission, including the premiums to be paid by the state treasurer for the bond to be furnished by him, shall be paid out of the state treasury upon vouchers signed by at least two commissioners. (As am'd by L. 1915, Ch. 674.)

§ 63. Office. The commission shall keep and maintain its principal office in the city of Albany, in rooms in the capitol assigned by the trustees of public buildings. The office shall be supplied with necessary office furniture, supplies, books, maps, stationery, telephone connections and other necessary appliances, at the expense of the state, payable in the same manner as other expenses of the commission.

§ 64. Sessions of commission. The commission shall be in continuous session and open for the transaction of business during all business hours of every day excepting Sundays and legal holidays. All sessions shall be open to the public and may be adjourned, upon entry thereof in its records, without further notice. Whenever convenience of parties will be promoted or delay and expense prevented, the commission may hold sessions in cities other than the city of Albany. A party may appear before such commission and be heard in person or by attorney. Every vote and official act of the commission shall be entered of record, and the records shall contain a record of each case considered, and the award, decision or order made with respect thereto, and all voting shall be by the calling of each commissioner's name by the secretary and each vote shall be recorded as cast. A majority of the commission shall constitute a quorum. A vacancy shall not impair the right of the remaining commissioners to exercise all the powers of the full commission so long as a majority remains.

§ 65. Powers of individual commissioners and deputy commissioners. Any investigation, inquiry or hearing which the commission is authorized to hold or undertake may be held or taken by or before any commissioner or deputy commissioner, and the award, decision or order of a commissioner or deputy commissioner, when approved and confirmed by the commission and ordered filed in its office, shall be deemed to be the award, decision or order of the commission. Each commissioner and deputy shall, for the purposes of this chapter, have power to administer oaths, certify to official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony. The commission may authorize any deputy to conduct any such investigation, inquiry or hearing, in which case he shall have the power of a commissioner in respect thereof.

§ 66. Powers and duties of secretary. The secretary of the commission shall:

1. Maintain a full and true record of all proceedings of the commission, of all documents or papers ordered filed by the commission, of decisions or orders made by a commissioner or deputy commissioner, and of all decisions or orders made by the commission or approved and confirmed by it and ordered filed, and he shall be responsible to the commission for the safe custody and preservation of all such documents at its office;

2. Have power to administer oaths in all parts of the state, so far as the exercise of such power is properly incident to the performance of his duty or that of the commission;

3. Designate, from time to time, with the approval of the commission, one of the clerks appointed by the commission to exercise the powers and duties of the secretary during his absence;

4. Under the direction of the commission, have general charge of its office, superintend its clerical business, and perform such other duties as the commission may prescribe.

§ 67. Rules. The commission shall adopt reasonable rules, not inconsistent with this chapter, regulating and providing for

1. The kind and character of notices, and the service thereof, in case of accident and injury to employees;

2. The nature and extent of the proofs and evidence,

and the method of taking and furnishing the same, to establish the right to compensation;

3. The forms of application for those claiming to be entitled to compensation;

4. The method of making investigations, physical examinations and inspections;

5. The time within which adjudications and awards shall be made;

6. The conduct of hearings, investigations and inquiries;

7. The giving of undertakings by all subordinates who are empowered to receive and disburse moneys, to be approved by the attorney-general as to form and by the comptroller as to sufficiency;

8. Carrying into effect the provisions of this chapter;

9. The collection, maintenance and disbursement of the state insurance fund. (As re-enacted by L. 1916, Cr. 622, effective June 1, 1916.)

§ 68. Technical rules of evidence or procedure not required. The commission or a commissioner or deputy commissioner in making an invsestigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties.

In the case of *Carroll,* Matter of *vs. Knickerbocker Ice Co.,* 169 App. Div. 450; 155 N. Y. Supp. 1, the Court held that the Commission might make an award of compensation based entirely upon hearsay evidence. This decision was made by divided Court, the minority being of the opinion that some evidence of a sound, competent and recognizedly probative character must be present to sustain the findings. The case is now pending in the Court of Appeals.

The Commission will not make an award upon hearsay evidence unless it is convinced of the truth of such evidence.

Stadtmuller, Matter of *vs. George Ehret,* The Bulletin, Vol. 1, No. 4, page 9.

(See also editorials on hearsay evidence, New York Law Journal, October 11, 1915, November 16, 1915, and December 20, 1915, and editorial on sufficiency of evidence to support award, New York Law Journal, January 31, 1916.)

§ 69. **Issue of subpoena; penalty for failure to obey.** A subpoena shall be signed and issued by a commissioner, a deputy commissioner or by the secretary of the commission and may be served by any person of full age in the same manner as a subpoena issued out of a court of record. If a person fail, without reasonable cause, to attend in obedience to a subpoena, or to be sworn or examined or answer a question or produce a book or paper, or to subscribe and swear to his deposition after it has been correctly reduced to writing, he shall be guilty of a misdemeanor.

§ 70. **Recalcitrant witnesses punishable as for contempt.** If a person in attendance before the commission or a commissioner or deputy commissioner refuses, without reasonable cause, to be examined, or to answer a legal and pertinent question or to produce a book or paper, when ordered so to do by the commission or a commissioner or deputy commissioner, the commission may apply to a justice of the supreme court upon proof by affidavit of the facts for an order returnable in not less than two nor more than five days directing such person to show cause before the justice who made the order, or any other justice of the supreme court, why he should not be committed to jail. Upon the return of such order the justice shall examine under oath such person and give him an opportunity to be heard; and if the justice determine that he has refused without reasonable cause or legal excuse to be examined or to answer a legal and pertinent question, or to produce a book or paper which he was ordered to bring, he may forthwith, by warrant, commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law.

§ 71. **Fees and mileage of witnesses.** Each witness who appears in obedience to a subpoena before the commission or a commissioner or deputy commissioner, or person employed by the commission to obtain the required information, shall receive for his attendance the fees and mileage provided for witnesses in civil cases in the supreme court,

which shall be audited and paid from the state treasury in the same manner as other expenses of the commission. A witness subpoenaed at the instance of a party other than the commission, a commissioner, deputy commissioner or person acting under the authority of the commission shall be entitled to fees or compensation from the state treasury, if the commission certify that his testimony was material to the matte rinvestigated, but not otherwise.

§ 72. **Deposition.** The commission may cause depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the supreme court.

§ 73. **Transcript of stenographer's minutes; effect as evidence.** A transcribed copy of the testimony, evidence and procedure or of a specific part thereof, or of the testimony of a particular witness or of a specific part thereof, on any investigation, by a stenographer appointed by the commission, being certified by such stenographer to be a true and correct transcript thereof and to have been carefully compared by him with his original notes, may be received by the commission with the same effect as if such stenographer were present and testified to the facts so certified, and a copy of such transcript shall be furnished on demand to any party upon payment of the fee provided for a transcript of similar minutes in the supreme court.

§ 74. **Jurisdiction of commission to be continuing.** The power and jurisdiction of the commission over each case shall be continuing, and it may, from time to time, make such modification or change with respect to former findings or orders relating thereto, as in its opinion may be just. (See also Section 22.)

§ 75. **Report of commission.** Annually on or before the first day of February, the commission shall make a report to the legislature, which shall include a statement of the number of awards made by it and the causes of the accidents leading to the injuries for which the awards were made, a detailed statement of the expenses of the commission, the condition of the state insurance fund, together with any other matter which the commission deems proper to report to the legislature, including any recommendations it may desire to make.

§ 76. **Commission to furnish blank forms.** The commission shall prepare and cause to be distributed so that the same may be readily available blank forms of applica-

tion for compensation, notice to employers, proofs of injury or death, of medical or other attendance or treatment, of employment and wage earnings, and for such other purposes as may be required. Insured employers shall constantly keep on hand a sufficient supply of such blanks.

§ 77. **Expenses of administering commission.** As soon as practicable after July first, nineteen hundred and seventeen, and annually thereafter, the commission shall ascertain the total amount of its expenses incurred during the preceding fiscal year, in connection with the administration of the workmen's compensation law, and shall thereupon assess upon and collect from each insurance carrier, including the state insurance fund, the proportion of such expense that the total compensation or payments made by such carrier in such year bore to the total compensation or payments made by all insurance carriers. The amounts so secured shall be transferred to the state treasury to reimburse it for this portion of the expense of administering this chapter. (Sec. 77, added by L. 1916, Ch. 622, effective June 1, 1916.)

ARTICLE 5.

State Insurance Fund.

Section 90. Creation of state fund.
91. State treasurer custodian of fund.
92. Surplus and reserve.
93. Investment of surplus or reserve.
94. Administration expense.
95. Classification of risks and adjustment of premiums.
96. Associations for accident prevention.
97. Requirements in classifying employment and fixing and adjusting premium rates.
98. Time of payment of premiums.
99. Actions for collection in case of default.
100. Withdrawal from fund.
101. Audit of payrolls.
102. Falsification of payroll.
103. Wilful misrepresentation.
104. Inspections.
105. Disclosures prohibited.

§ 90. **Creation of state fund.** There is hereby created a fund to be known as "the state insurance fund," for the purpose of insuring employers against liability under this chapter and of assuring to the person entitled thereto the compensation provided by this chapter. Such fund shall consist of all premiums received and paid into the fund, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys belonging to the fund and deposited or invested as herein provided. Such fund shall be administered by the commission without liability on the part of the state beyond the amount of such fund. Such fund shall be applicable to the payment of losses sustained on account of insurance and to the payment of expenses in the manner provided in this chapter.

(For a discussion of the liability of employers who insure in the State Fund, see Part II, Sections 28, 29 and 30.)

§ 91. **State treasurer custodian of fund.** The state treasurer shall be the custodian of the state insurance fund; and all disbursements therefrom shall be paid by him upon vouchers authorized by the commission and signed by any two members thereof. The state treasurer shall give a separate and additional bond in an amount to be fixed by the governor and with sureties approved by the state comptroller conditioned for the faithful performance of his duty as custodian of the state fund. The state treasurer may deposit any portion of the state fund not needed for immediate use, in the manner and subject to all the provisions of law respecting the deposit of other state funds by him. Interest earned by such portion of the state insurance fund deposited by the state treasurer shall be collected by him and placed to the credit of the fund.

§ 92. **Surplus and reserve.** Ten per centum of the premiums collected from employers insured in the fund shall be set aside by the commission for the creation of a surplus until such surplus shall amount to the sum of one thousand dollars, and thereafter five per centum of such premiums, until such time as in the judgment of the commission such surplus shall be sufficiently large to cover the catastrophe hazard. The commission shall also set up and maintain reserves adequate to meet anticipated losses and carry all claims and policies to maturity, which re-

serves shall be computed in accordance with such rules as shall be approved by the superintendent of insurance. (Sec. 90, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

§ 93. **Investment of surplus or reserve.** The commission may, pursuant to a resolution of the commission approved by the comptroller, invest any of the surplus or reserve funds belonging to the state insurance fund in the same securities and investments authorized for investment by savings banks. All such securities or evidences of indebtedness shall be placed in the hands of the state treasurer who shall be the custodian thereof. He shall collect the principal and interest thereof, when due, and pay the same into the state insurance fund. The state treasurer shall pay all vouchers drawn on the state insurance fund for the making of such investments when signed by two members of the commission, upon delivery of such securities or evidences of indebtedness to him, when there is attached to such vouchers a certified copy of the resolution of the commission authorizing the investment. The commission may, upon like resolution approved by the comptroller, sell any of such securities.

§ 94. **Administration expense.** The entire expense of administering the state insurance fund shall be paid in the first instance by the state, out of moneys appropriated therefor. In the month of July, nineteen hundred and seventeen, and annually thereafter in such month, the commission shall ascertain the just amount incurred by the commission during the preceding fiscal year, in the administration of the state insurance fund, and shall refund such amount to the state treasury. If there be employees of the commission other than the commissioners themselves and the secretary whose time is devoted partly to the general work of the commission and partly to the work of the state insurance fund, and in case there is other expense which is incurred jointly on behalf of the general work of the commission and the state insurance fund, an equitable apportionment of the expense shall be made for such purpose and the part thereof which is applicable to the state insurance fund shall be chargeable thereto. (Sec. 94, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

The amendment made to this section by the Laws of 1916, makes the State Fund self-supporting from and after July 1, 1916, instead of from and after January

1, 1917, as in the original act. The former provisions of this section in relation to the expenses in connection with the examination, determination and payment of claims, to be assessed against the insurance carriers, is now contained in Section 77.

> **§ 95. Classification of risks and adjustment of premiums.** Employments coming under the provisions of this chapter shall be divided for the purposes of the state fund, into the groups set forth in section two of this chapter. Separate accounts shall be kept of the amounts collected and expended in respect to each such group for convenience in determining equitable rates; but for the purpose of paying compensation the state fund shall be deemed one and indivisible. The commission shall have power to rearrange any of the groups set forth in section two by withdrawing any employment embraced in it and transferring it wholly or in part to any other group, and from such employments to set up new groups at its discretion. The commission shall determine the hazards of the different classes composing each group and fix the rates of premiums therefor based upon the total payroll and number of employees in each of such classes of employment at the lowest possible rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve; and for such purpose may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of each individual risk.

The only way in which a single employer in the State Fund can be separately grouped is where the nature of his business and the degree of risk of injury is such that he, in fact, represents a group by himself, subject, however, to the opportunity of other employers coming within its limitations to be made members of that group; and the only way in which a single employer in the State Fund can secure a rate different from that allowed to other employers in such Fund of the same group is through a system of schedule rating as provided in the last sentence of Sec. 95. But, for dividend purposes, even an employer so rated still remains in the group in which he is placed and dividends must be declared as a result of total experience of the group of which he is a member for the premium period.

Opinion of Attorney-General, Jan. 28, 1916.

§ 96. Associations for accident prevention. The employers in any of the groups described in section two or established by the commission may with the approval of the commission form themselves into an association for accident prevention, and may make rules for that purpose. If the commission is of the opinion that an association so formed sufficiently represents the employers in such group, it may approve such rules, and when so approved and approved by the industrial board of labor department they shall be binding on all employers in such group. If such an approved association appoint an inspector or expert for the purpose of accident prevention, the commission may at its discretion provide in whole or in part for the payment of the remuneration and expenses of such inspector or expert, such payment to be charged in the accounting to such group. Every such approved association may make recommendations to the commission concerning the fixing of premiums for classes of hazards, and for individual risks within such group.

§ 97. Requirements in classifying employment and fixing and adjusting premium rates. The following requirements shall be observed in classifying employments and fixing and adjusting premium rates:

1. The commission shall keep an accurate account of the money paid in premiums by each of the several classes of employments or industries, and the disbursements on account of injuries and deaths of employees thereof, including the setting up of reserves adequate to meet anticipated losses and to carry the claims to maturity, and also, on account of the money received from each individual employer and the amount disbursed from the state insurance fund on account of injuries and death of the employees of such employer, including the reserves so set up;

2. On January first, nineteen hundred and fifteen, and every fifth year thereafter, and at such other times as the commission, in its discretion, may determine, a readjustment of the rate shall be made for each of the several groups of employment or industries and of each hazard class therein, which, in the judgment of the commission, shall have developed an average loss ratio, in accordance with the experience of the commission in the administration

of the law as shown by the accounts kept as provided herein;

3. If any such accounting show an aggregate balance (deemed by the commission to be safely and properly divisible) remaining to the credit of any class of employment or industry, after the amount required shall have been credited to the surplus and reserve funds and after the payment of all awards for injury or death lawfully chargeable against the same, the commission may in its discretion credit to each individual member of such group, who shall have been a subscriber to the state insurance fund for a period of six months or more prior to the time of such readjustment, and whose premium or premiums exceed the amount of the disbursements from the fund on account of injuries or death of his employees during such period, on the instalment or instalments of premiums next due from him such proportion of such balance as the amount of his prior paid premiums sustains to the whole amount of such premiums paid by the group to which he belongs since the last readjustment of rates. In the event that any member of the group who has heretofore or shall hereafter withdraw would have become entitled to such dividend if he had remained in the fund the commission is empowered to pay the amount of the dividend to such employer. (Subd. 3, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

4. If the amount of premiums collected from any employer at the beginning of any period of six months is ascertained and calculated by using the estimated expenditure of wages for the period of time covered by such premium payment as a basis, an adjustment of the amount of such premium shall be made at the end of such six months, and the actual amount of such premium shall be determined in accordance with the amount of the actual expenditure of wages for such period; and, if such wage expenditure for such period is less than the amount on which such estimated premium was collected, such employer shall be entitled to receive a refund from the state insurance fund of the difference between the amount so paid by him and the amount so found to be actually due, or to have the amount of such difference credited on succeeding premium payments, at his option; and if such actual premium, when so ascertained, exceeds in amount a premium so paid by such employer at the beginning of such six months,

such employer shall immediately upon being advised of the true amount of such premium due forthwith pay to the treasurer of the state an amount equal to the difference between the amount actually found to be due and the amount paid by him at the beginning of such six months' period.

§ 98. Time of payment of premiums. Except as otherwise provided in this chapter, all premiums shall be paid by every employer into the state insurance fund on or before July first, nineteen hundred and fourteen, and semi-annually thereafter, or at such other time or times as may be prescribed by the commission. The commission shall mail a receipt for the same to the employer and place the same to the credit of the state insurance fund in the custody of the state treasurer.

§ 99. Action for collection in case of default. If an employer shall default in any payment required to be made by him to the state insurance fund, the amount due from him shall be collected by civil action against him in the name of the people of the state of New York, and it shall be the duty of the commission on the first Monday of each month after July first, ninteen hundred and fourteen, to certify to the attorney-general of the state the names and residences, or places of business, of all employers known to the commission to be in default for such payment or payments for a longer period than five days and the amount due from such employer, and it shall then be the duty of the attorney-general forthwith to bring or cause to be brought against each such employer a civil action in the proper court for the collection of such amount so due, and the same when collected, shall be paid into the state insurance fund, and such employer's compliance with the provisions of this chapter requiring payments to be made to the state insurance fund shall date from the time of the payment of said money so collected as aforesaid to the state treasurer for credit to the state insurance fund.

§ 100. Withdrawal from fund. Any employer may, upon complying with subdivision two or three of section fifty of this chapter, withdraw from the fund by turning in his insurance contract for cancellation, provided he is not in arrears for premiums due the fund and has given to the commission written notice of his intention to withdraw within thirty days before the expiration of the period for which he has elected to insure in the fund; provided

that in case any employer so withdraws, his liability to assessment shall, notwithstanding such withdrawal, continue for one year after the date of such withdrawal as against all liabilities for such compensation accruing prior to such withdrawal. (Sec. 100, am'd by L. 1916, Ch. 622, effective June 1, 1916.)

(The amendment of 1916 makes no change in this section. As the bill amending the law generally was originally drafted, the last clause in this section relating to assessments was repealed but this clause was subsequently restored, leaving the section as it originally existed.)

This section does not authorize assessments against employers who withdraw from the Fund.

Opinion of Attorney-General, July 16, 1915.

Upon the question of assessments, see also Part II, Sec. 29.

§ 101. **Audit of payrolls.** Every employer who is insured in the state insurance fund shall keep a true and accurate record of the number of his employees and the wages paid by him, and shall furnish to the commission, upon demand, a sworn statement of the same. Such record shall be open to inspection at any time and as often as the commission shall require to verify the number of employees and the amount of the payroll.

§ 102. **Falsification of payroll.** An employer who shall wilfully misrepresent the amount of the payroll upon which the premiums chargeable by the state insurance fund is to be based shall be liable to the state in ten times the amount of the difference between the premiums paid and the amount the employer should have paid had his payroll been correctly computed and the liability to the state under this section shall be enforced in a civil action in the name of the state insurance fund, and any amount so collected shall become a part of such fund.

§ 103. **Wilful misrepresentation.** Any person who wilfully misrepresents any fact in order to obtain insurance in the state insurance fund at less than the proper rate for such insurance, or in order to obtain payment out of such fund, shall be guilty of a misdemeanor.

§ 104. Inspections. The commission shall have the right to inspect the plants and establishments of employers insured in the state insurance fund; and the inspectors designated by the commission shall have free access to such premises during regular working hours.

§ 105. Disclosures prohibited. Information acquired by the commission or its officers or employees from employers or employees pursuant to this chapter shall not be opened to public inspection, and any officer or employee of the commission who, without authority of the commission or pursuant to its rules or as otherwise required by law shall disclose the same shall be guilty of a misdemeanor.

§ 106. Reports of state insurance fund; examination by insurance department. The commission shall make reports to the superintendent of insurance concerning the state insurance fund at the same times and in the same manner as is required from mutual employers' liability and workmen's compensation corporations by section one hundred and ninety-two of the insurance law, and the superintendent of insurance may examine into the condition of such state insurance fund at any time, either personally or by any duly authorized examiner appointed by him, for the purpose of determining the condition of the investments and the adequacy of the reserves of such fund. (Sec. 106, added by L. 1916, Ch. 622, effective June 1, 1916.)

ARTICLE 6.

Miscellaneous Provisions

Section 110. Penalties applicable to expense of commission.
111. Record and report of injuries by employers.
112. Information to be furnished by employer.
113. Inspection of records of employers.
114. Interstate commerce.
115. Penalties for false representations.
116. Limitation of time.
117. Duties of commissioner of labor.
118. Unconstitutional provisions.
119. Actions or causes of action pending.

§ 110. Penalties applicable to expenses of commission. All penalties imposed by this chapter shall be applicable to

the expenses of the commission. When collected by the commission such penalties shall be paid into the state treasury and be thereafter appropriated by the legislature for the purposes prescribed by this section.

§ 111. Record and report of injuries by employers. Every employer shall keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within ten days after the occurrence of an accident resulting in personal injury a report thereof shall be made in writing by the employer to the commission upon blanks to be procured from the commission for that purpose. Such report shall state the name and nature of the business of the employer, the location of his establishment or place of work, the name, address and occupation of the injured employee, the time, nature and cause of the injury and such other information as may be required by the commission. An employer who refuses or neglects to make a report as required by this section shall be guilty of a misdemeanor, punishable by a fine of not more than five hundred dollars.

(The Commission has ruled that a report of an accident made pursuant to the provisions of this section is a sufficient compliance with the requirements of Section 20 A, 87 and 126 of the Labor Law and that duplicate reports of accidents are unnecessary.)

§ 112. Information to be furnished by employer. Every employer shall furnish the commission, upon request, any information required by it to carry out the provisions of this chapter. The commission, a commissioner, deputy commissioner, or any person deputized by the commission for that purpose, may examine under oath any employer, officer, agent or employee. An employer or an employee receiving from the commission a blank with directions to file the same shall cause the same to be properly filled out so as to answer fully and correctly all questions therein, or if unable to do so, shall give good and sufficient reasons for such failure. Answers to such questions shall be verified under oath and returned to the commission within the period fixed by the commission therefor.

§ 113. Inspection of records of employers. All books, records and payrolls of the employers showing or reflecting in any way upon the amount of wage expenditures of such employers shall always be open for inspec-

tion by the commission or any of its authorized auditors, accountants or inspectors for the purpose of ascertaining the correctness of the wage expenditure and number of men employed and such other information as may be necessary for the uses and purposes of the commission in the administration of this chapter.

§ 114. **Interstate commerce.** The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this state may, subject to the approval and in the manner provided by the commission and so far as not forbidden by any act of congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees.

The compensation law applies to employees engaged in interstate commerce for whom no rule of liability or method of compensation has been established by Congress. It was held accordingly that the law applies to employees engaged in the operation, loading and unloading of vessels engaged in interstate commerce, as no rule of liability or method of compensation has been established by Congress for such employees.

The fact that the compensation law imposes an incidental burden upon interstate commerce does not render it unconstitutional.

Jensen, Matter of *vs. Southern Pacific Co.*, 215 N. Y. 514.

An employee injured upon a vessel upon the navigable waters of the United States has the option of claiming compensation or proceeding by suit in admiralty.

Walker, Matter of *vs. Clyde Steamship Co.*, 215 N. Y. 529.

The compensation law applies to railroad employees injured while engaged in intrastate work; and also to railroad employees injured while engaged in interstate

commerce where the injury is not due to negligence attributed to the employer.

Winfield, Matter of *vs. New York Central R. R. Co.*, 168 App. Div. 351; 153 N. Y. Supp. 499; aff. 216 N. Y. 284.

In the following cases in which compensation was awarded, it was held that the injured workman was not engaged in interstate commerce:

Where the claimant was making repairs in a car shop to a car which had been used indiscriminately in interstate and intrastate commerce.

Parsons, Matter of *vs. Delaware & Hudson Co.*, 167 App. Div. 536; 153 N. Y. Supp. 179.

Okrzsezs, Matter of *vs. Lehigh Valley R. R. Co.*, 170 App. Div. 15; 155 N. Y. Supp. 919.

Where the injured workman was a brakeman injured while switching empty cars which did not go outside of the State of New York but in connection with other roads carried passengers and baggage coming from or going to other states.

Fairchild, Matter of *vs. Pennsylvania R. R. Co.*, 170 App. Div. 135; 155 N. Y. Supp. 751.

Where the employee was working on a new telegraph line which was to take the place of the old line on the opposite side of the tracks.

Moore, Matter of *vs. Lehigh Valley R. R. Co.*, 2 N. Y. St. Dep. Rep. 472; 169 App. Div .177; 154 N. Y. Supp. 620.

Where the injured workman was a watchman over new construction work.

Claim 31018, *White*, Matter of *vs. New York Central R. R. Co.*, 2 N. Y. St. Dep. Rep. 477; Aff. 216 N. Y. Memo. 653.

Where the work was the taking of an inventory of supplies (which had not yet been used) at the request of the Interstate Commerce Commission.

Claim No. 12635, *Waite*, Matter of *vs. Pennsylvania R. R.*, Aff. 156 N. Y. Supp. 1149. (Without opinion.)

(See also Part I Sections 20 to 22 inclusive. For the Federal Employers' Liability Act see Appendix.)

Where the administrator settled with the railroad company for the sum of $800, an award was subsequently made to three minor children, it appearing that the employee's death was not due to negligence.

William H. Buell, deceased, *vs. N. Y. Central R. R. Co.*, The Bulletin, Vol. 1, No. 5, page 12.

§ 115. Penalties for false representation. If for the purpose of obtaining any benefit or payment under the provisions of this chapter, either for himself or any other person, any person wilfully makes a false statement or representation, he shall be guilty of a misdemeanor.

§ 116. Limitation of time. No limitation of time provided in this chapter shall run as against any person who is mentally incompetent or a minor dependent so long as he has no committee, guardian or next friend.

§ 117. Duties of commissioner of labor. The commissioner of labor shall render to the commission any proper aid and assistance by the department of labor as in his judgment does not interfere with the proper conduct of such department.

§ 118. Unconstitutional provisions. If any section or provision of this chapter be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the chapter as a whole or any part thereof other than the part so decided to be unconstitutional or invalid.

(The constitutionality of the compensation law was upheld generally by the Court of Appeals in the *Matter of Jensen vs. Southern Pacific Co.*, 215 N. Y. 514, distinguishing *Ives vs. So. Buffalo Railway Co.*, 201 N. Y. 271.)

§ 119. Actions or causes of action pending. This act shall not affect any action pending or cause of action existing or which accrued prior to July first, nineteen hundred and fourteen.

ARTICLE 7.

Laws Repealed; When to Take Effect.

Section 130. Laws repealed.
131. When to take effect.

§ 130. Laws repealed. Article fourteen-a and sections two hundred and fifteen to two hundred and nineteen-g,

both inclusive, of chapter thirty-six of the laws of nineteen hundred and nine, as amended* by chapter six hundred and seventy-four of the laws of nineteen hundred and ten, are hereby repealed.

§ 131. **When to take effect.** This chapter shall take effect immediately†, provided that the application of this chapter as between employers and employees and the payment of compensation for injuries to employees or their dependents, in case of death, shall take effect July first, nineteen hundred and fourteen, but payments into the state insurance fund may be made prior to July first, nineteen hundred and fourteen.

§ 2. This act shall take effect immediately, except as provided in section one hundred and thirty-one as re-enacted hereby.

* Should read "added."

† L. 1913, ch. 816, has words "January first, nineteen hundred and fourteen" instead of word "immediately."

RULES
STATE WORKMEN'S COMPENSATION COMMISSION.

RULES

STATE WORKMEN'S COMPENSATION COMMISSION.

(Now State Industrial Commission.)

Adopted June 10, 1914.

1. Form of notices.
2. To what offices notices shall be sent.
3. Which statements under oath.
4. Proof of average daily wages.
5. Notice of presentation of claim.
6. Witness put under oath.
7. Claim for compensation.
8. Who may examine.
9. Who may inspect.
10. Secretary shall digest the evidence.
11. Medical examination of claimants.
12. Order in dealing with claim.
13. Reference of claim to medical director.
14. Special Investigation through deputies.
15. Reference of all communications to the actuary.
16. Passing upon claim.
17. Action upon award by commissioner or deputy commissioner.
18. Action upon report of arbitrators.
19. Hearing judicial but not formal.
20. Stenographer's report of hearings.
21. Requisites to application for review.
22. Docketing of papers.
23. Employees receiving or disbursing money to give bond.
24. What employers and what employees subject to the act.
25. Rules for computing weekly wages.
26. Revision of award for reduction of earning capacity.
27. Ruling as to lien for physician's services, etc.
28. Time for making periodical payments.
29. Method of paying compensation.
30. When commuted and sued for.

31. Paying present value into state fund.
32. Methods of paying compensation.
33. Commuted value demanded of insolvents.
34. Physician's fees, etc., need not be insured.
35. Policies of companies must insure all entitled.
36. Condition of remitting penalty for non-compliance.
37. Commission to supply blanks.
38. Expense accounts of commission.
39. Classifying employments of a single employer.
40. How interstate and foreign commerce employers may comply.
41. Hours of sessions.
42. When physician's bill not to be considered.
43. Employees insured in state fund.
44. Premiums payable to state fund.
45. How disbursements from state fund made.
46. Monthly session to consider report of state fund.
47. Form of state fund accounts.
48. Readjustment of premium payroll to state fund.
49. Time for paying premiums to state fund.
50. Repeal, amendment or adoption of rules.

1. Form of notices. For notices of injury and of death required by section 18 of the Workmen's Compensation Act to be given the commission and the employer, blanks as per form Nos. C-1 and C-24, shall be provided; but any notice which furnishes substantially the information called for by such section shall be deemed sufficient whether upon such blank or not.

2. To what offices notices shall be sent. All notices should be sent to the principal offices of the commission in the Capitol, Albany, New York, or should be sent to the office of the commission, No. 1 Madison Avenue (now 230 Fifth Ave.), New York City.

3. Which statements under oath. The notices of injury from the employee and from the employer and the statements made and signed by the attending physician or physicians shall be taken as and constitute part of the proof in all cases, though not under oath; a statement must be made under oath or by affirmation, of, and in regard to, every claim, and all statements offered to controvert the same must also be under oath or by affirmation. Other statements may be received though not verified.

4. Proof and average daily wages. If the state-

ments of the employer and of the employee as to his average daily wages, contained in their respective notices of injury, agree, the commission will, at its discretion, base its award upon such as the daily wages without requiring other evidence regarding the same; otherwise (and in every case if there be reason to suspect that the employee is of the class described in subdivision 3 of section 14 of the act) an investigation shall be made and such further evidence required as the commission may deem necessary to determine the average daily wages under the provisions of section 14 of the act.

5. **Notice of presentation of claim.** Upon a claim for compensation being presented to the commission, there shall be mailed to the employer and to his insurance carrier a copy of the claim, together with notice that the same will come before the commission on a certain day and that an award may be made upon the evidence then in hand unless a hearing is demanded or an adjournment had.

6. **Witness put under oath.** In any investigation, inquiry or hearing, by the commission or by a commissioner or by a deputy commissioner duly deputized to make the same, each person interrogated will, at the discretion of the commission, commissioner or deputy commissioner, conducting the investigation, be required to answer under oath (or by affirmation) and to produce any book or paper in his possession or custody pertinent to the inquiry.

7. **Claim for compensation.** Claims for compensation for disability or death shall be presented to the commission as required by section 20 of the act, upon blank form No. C-3 for disability, and blank form No. C-24 for death, which shall be filled out and sworn to (or affirmed) by the injured employee or a dependent or some one on his or her behalf, as the case may be, and mailed to the commission in the same manner as notices of injury or of death; but a writing which sets forth the claims shall not be rejected as insufficient because not upon one of such blank forms or because not verified.

(Under Section 20 of the Compensation Law as amended by Chapter 167 of the laws of 1915, the claim for compensation must first be presented to the employer. If rejected or if no agreement is made within ten days, the claim may be presented to the Commission.)

8. **Who may examine.** Physical examinations may be made by the medical director or one of his assistants, by a district physician or by any other physician duly author-

ized by the commission or the medical director.

9. Who may inspect. All inspection shall be made by the commission, by a commissioner, or deputy commissioner, or other person specially authorized by the commission.

10. Secretary shall digest the evidence. When a claim shall be brought before the commission, the secretary shall present a digest of the evidence received upon the questions necessary to be determined by the Commission with a list of all documents upon which the digest is predicated, and shall provide a copy of such digest for each commissioner. The original digest shall be marked by him so as to identify it with the claim and with the day when it was so presented, and shall be filed with the claim papers to which it refers.

11. Medical examination of claimants. Whenever, through insufficiency of proof, it is deemed necessary, the commission or a commissioner or deputy commissioner may order the examination of a claimant by the local medical examiner. The report of such examiner shall be confidential. If able to do so, the claimant must present himself at the office of the local medical examiner for examination in case this is requested; if the claimant is not able to attend there, the local medical examiner must call upon the claimant. Any case calling for expert examination may be referred to a specialist, employed by the commission, for his examination.

The expense of all such examinations shall be paid by the commission at rates agreed upon by it and by the medical examiner in his contract of employment.

12. Order in dealing with claim. Upon receipt of a claim for compensation, the chief of the claim bureau shall determine if claimant's employer is insured, and, if so, with what insurance carrier and whether or not, on the papers in hand, the claim is compensatable. If so, it shall be docketed.

The papers, when complete, shall be analyzed by the chief of the claim bureau or his assistant and summarized for presentation to the commission. Such summary shall embrace findings of facts, offered to be passed upon by the commission, upon which its decision may be predicated.

13. Reference of claim to a medical director. Whenever, in the opinion of the chief of the claim bureau,

it is desirable to have the opinion of the medical director upon the nature and extent of the injury, the claim papers shall be referred to him for his opinion thereon and for such further investigation as he may order.

14. Special investigation through deputies. All cases of special investigation, other than medical, because of insufficient evidence, conflict of testimony, ambiguity, suspicion of fraud or simulation or malingering shall, unless otherwise ordered, be referred to the deputy commissioner for the district in which the claimant resides.

15. Reference of all communications to the actuary. All communications of future payment of compensation shall be computed by the actuary or his assistant, using such interest, mortality, remarriage and other factors as shall be adopted by the commission for the purpose; the results of all such computations shall be reported to the commission and shall not be given out except as authorized by it.

16. Passing upon a claim. With the copy of the claim to be sent to the employer and his insurance carrier, there shall be sent a notice of the day not more than ten days after the date of the notice of claim when the claim will come before the commission for consideration. If upon such day or any subsequent day to which such consideration may be adjourned, the evidence before the commission, either upon a hearing or without a hearing, establishes, in its opinion, all the facts necessary to determine the right to compensation, the amount thereof and the persons entitled thereto, it shall make a decision in accordance therewith, granting or denying compensation, and shall make and file with such decision a finding of the facts upon which the same is made.

(The requirement of ten days' notice has been modified by the Commission in practice. Notice of five days is usually given but the time is frequently less.)

17. Action upon award by commissioner or deputy commissioner. In a case where a commissioner or a deputy commissioner shall have made an award, decision or order, as provided in section 65 of the act, notice thereof shall be mailed to the employer, his insurance carrier and each claimant for compensation specifying the day upon which the same will be brought before the commission for approval and confirmation and upon such day or any subsequent day to which such consideration may be adjourned,

the Commission may approve and confirm such award, decision or order and order the same filed in its office or may modify the same, and, as so modified, approve, confirm and order it filed or may wholly reject the same and make its own award with or without further investigation or hearing.

18. Action upon report of arbitrators. In case an arbitration shall have been instituted in regard to any claim under the provisions of section 20 of the act, upon receipt of the report of the arbitration committee, notices thereof shall be mailed to the employer, his insurance carrier and each claimant for compensation specifying the day upon which such report will come before the commission for consideration and upon such day or any subsequent day to which such consideration may be adjourned, the commission may adopt, modify and adopt as modified or wholly reject such report and make its award, with or without further investigation or hearing.

19. Hearing judicial but not formal. Every hearing upon a claim, held before the commission, a commissioner or a deputy commissioner, or an arbitration committee shall be conducted as a judicial proceeding, all witnesses testifying under oath or by affirmation, and a record of the proceedings shall be made and kept. Such hearing shall be conducted in such manner as to ascertain the substantial rights of the parties and the commission, commissioner, deputy commissioner or arbitration committee therein shall not be bound (see sec. 68 of the act) by common law or statutory rules of evidence or by technical or formal rules of procedure.

20. Stenographer's report of hearings. The proceedings of every hearing before the commission or before a commissioner, deputy commissioner or board of arbitration shall be taken down by a stenographer appointed by the commission and a report thereof, certified by such stenographer to be a true and correct report of such proceedings and to have been carefully compared by him with his original notes, may be received in evidence with the same effect as if such stenographer were present and testified to the facts so certified.

21. Requisites to application for review. The commission will not grant reviews of awards upon the application of a party or parties except such application be made upon the grounds of a change in conditions, as provided in sec-

tion 22 of the act, and be accompanied with a verified statement of the facts alleged to constitute such change of conditions; but upon its own motion it will exercise its continuing jurisdiction over each case and for reasons deemed by it to be sufficient will, from time to time, make such modification or change with respect to its former findings or orders relating to any such case, as in its opinion may be just, including the making of awards in cases where they have been denied.

22. Docketing of papers. The notice of injury or other notice or paper relating to an injury first coming to the attention of the commission shall be docketed and given a number; and each paper thereafter filed in connection with such injury shall be entered upon this docket and be given the same number as the paper first received.

23. Employees receiving or disbursing money to give bond. All employees of the commission, who shall be authorized to receive or to disburse moneys for, or on behalf of, the commission, shall give to the commission and maintain with it a bond or undertaking in such amount as may be fixed by the commission, signed by two sureties or by a corporation duly authorized to transact the business of fidelity insurance in the state of New York, subject to the approval of the attorney-general as to form and of the comptroller as to sufficiency.

24. What employers and what employees subject to the act. The commission for the purpose of the state insurance fund and of carrying into effect the provisions of this chapter construes:

(1) That section 2 of the act means that each employer who shall be adjudged by the commission to be conducting a hazardous employment, as defined in such section, is required by section 50 of the act to secure the payment of compensation at the scale provided in the act for injuries to or deaths of employees engaged in his service upon the premises or at the plant where such employment is carried on, or in the course of employment away from such plant, due to accident arising out of and in the course of employment by him; and all orders, decisions and awards will be made, and all policies of the state fund will be issued, upon this basis.

(2) That every generic name of employment in the groups enumerated in section 2 of the act, was intended by the legislature to cover and designate broadly all haz-

ardous employments of the general nature and character indicated by such name which are not elsewhere in such groups specifically mentioned and that the commission is vested with the power and duty to determine, for the purpose of carrying the provisions of the act into effect and for the purposes of the state insurance fund, which employments are included under each such generic name.

(3) That the word "manufacture," wherever found in section 2 of the act, includes, unless the contrary is plainly indicated, not only manufacture of each material named, but also the manufacture of the same, as the sole or chief component element, into articles for use carried on by the employer for pecuniary gain.

(4) That the words "manufacture" and "construction" and other words of like import include repair when carried on as, or as a part of, "trade, business or occupation carried on by the employer for pecuniary gain."

25. Rules for computing weekly wages. The rules for determining the average weekly wages under the provisions of section 14 shall be as follows:

(a) If there be no dispute as to average daily wage or salary, multiply same by 300 and divide by 52.

(b) If the average daily wage or salary be established under the provisions of subdivision 1 or 2 of section 14 of the act, multiply same by 300 and divide by 52.

(c) If the average annual earnings be established under the provisions of subdivision 3 of section 14 of the act, divide by 52.

(d) If facts be established as per subdivision 5 of section 14 of the act, modify average daily wage or salary as found by (a), (b) or (c) in accordance with the facts established by such evidence, such modification, however, to affect the compensation only from the day when the employee reaches (or if deceased, would have reached) the age of 21 or a later day after which in the opinion of the commission his wages or salary would have been so increased.

26. Revision of award for reduction of earning capacity. In determining the difference between the average weekly wages of an employee and his wage-earning capacity after an injury in the same employment or otherwise under subdivision 3 or subdivision 4 of section 15 of the act, the difference between such wages before, and the

actual wages after, such injury may, in the discretion of the commission, be made the basis for its award of compensation for partial disability, subject, however, to modification thereof upon a proper showing under section 22 that such actual wages so received after the injury are no longer paid and do not correctly represent the reduced wage-earning capacity of the injured employee.

27. Ruling as to lien for physician's services, etc. For the purpose of carrying into effect the provisions of the act, the commission construes that portion of section 24 thereof which makes claims for services or treatment rendered or supplies furnished pursuant to section 13 thereof a lien upon the compensation awarded, to mean and apply, only to claims approved by the commission, for services, treatment or supplies for which the employee may have incurred liability but for which under the provisions of such section the employer is not liable.

28. Time for making periodical payments. All periodical payments for compensation shall be made bi-weekly on alternate Mondays, except as the commission may otherwise order.

29. Method of paying compensation. All insurance companies issuing policies to enable an employer to secure the payment of compensation under subdivision 2 of section 50 of the act and all employers who shall secure the payment of such compensation under subdivision 3 of such section shall make payment of the same to the commission in cash or by check or draft drawn upon a New York City bank or trust company for each item of compensation so payable, and the commission shall disburse the same by its own checks embracing the proper voucher therefor; provided that any such insurance company or employer may instead, make and maintain at all times with the Commission such cash deposit as will, in the opinion of the commission, secure the prompt and convenient payment of such compensation and authorize the commission at its discretion and without liability for the exercise thereof to pay out of such deposit all compensation awarded by the commission to be paid by such insurance company or employer and engaging to replenish such deposit promptly on demand by replacing all sums so paid out.

30. When commuted and sued for. In all cases of resistance to the award of the commission by refusal or neglect of the employer or the insurance carrier to pay

compensation, persisted in longer than ten days, the commission will, if convinced that such refusal or neglect is without good cause or excuse, and in any case may, compute the present value of all compensation so awarded and declare the whole amount thereof due and enforce the payment thereof with the added penalty of 50 per centum as provided in section 26 of the act.

31. Paying present value into state fund. The commission will require, under the provision of section 27 of the act, every insurance company issuing policies under subdivision 2 of section 50 of the act to secure the payment of compensation and every employer securing the payment of compensation under subdivision 3 of section 50, to transfer to the state insurance fund all further liability under such awards by paying amounts equal to the present value, computed by the commission with due regard to life contingencies, of all future payments in the following cases:

(1) Every case of death, involving periodical payments.

(2) Every case of total permanent disability.

(3) Every case of permanent partial disability consisting of a specific injury scheduled in subdivision 3 of section 15 of this act, the period of payment of compensation for which exceeds one hundred and twenty-eight weeks or longer.

(4) Every other case of permanent partial disability, the compensation for which shall not be commuted.

(5) Every case of temporary total disability or temporary partial disability, regarding which, in the opinion of the commission, good cause exists why such should be required.

All sums so paid in shall be received and held in the state insurance fund, the aggregate amount thereof to constitute a trust fund to provide for the payment of all awards of compensation of which the same were computed to be the commuted values, the payment of which out of such aggregate trust fund or otherwise will be assumed by the state fund and such insurance corporation and employers shall be discharged from any further liability under such awards.

Unless good cause exist in the opinion of the Commission, for requiring otherwise in a particular case or cases, no disability shall for the purposes of this rule be deemed

finally adjudged permanent and no order will be made to pay into the state fund an amount equal to such commuted value, until six months shall have elapsed after the injury; but during such period of six months the compensation shall be paid to the commission and be disbursed as provided by section 25 of the act.

32. Methods of paying compensation. To assure that compensation and benefits are actually paid only to injured employees or their dependents or, in case of minority, incompetence or other legal disability, to a guardian, committee or other person charged with or assuming the burden of the care and support of such employee or dependent, all payments of compensation and benefits shall, at the discretion of the commission, be made in one of the following ways:

(1) By making the check of the commission directly payable to the person entitled to the compensation and paying the same over to him.

(2) By drawing a voucher against the state treasurer upon the state insurance fund, so as to be so payable, and so paying it over.

(3) By so paying such compensation or benefits in cash, taking proper receipt therefor, signed by the employee, dependent, guardian, committee or other legal representative.

(This rule for the payment of compensation was modified and repealed by implication by Chapter 167 of the Laws of 1915. Section 25 of the Compensation Law as amended by this chapter requires the payment of compensation directly by the employer instead of through the commission.)

33. Commuted value demanded of insolvents. In case of the insolvency of an employer or of an insurance carrier, the commission shall at once proceed to compute the present value of all future payments of compensation to be made by such insolvent, with due regard to life contingencies, as provided in Rule No. 22 and shall require the same to be paid into the state insurance fund under the provisions of section 27 of the act, making claim for the whole of the same as a preference or lien upon the assets of such insolvent under the provisions of section 34 of the act.

34. Physician's fees, etc., need not be insured. The commission rules that section 50 of the act requires the employer to insure only the payment of compensation as

defined in subdivision 6 of section 3 of the act, *i. e.*, of compensation to employees and their dependents including funeral benefits, and does not require him to insure the payment of the cost of "treatment and care of injured employees" provided for by section 13 of the act, but liability under section 13 may be insured at the option of the employer.

35. Policies of companies must insure all entitled. The commission rules that no policy of insurance will be accepted as compliance with section 50 of the act, which shall not insure the payment of compensation to all persons entitled to compensation under the act.

36. Condition to remitting penalty for non-compliance. Penalty for failure to comply with the provisions of section 50 of the act shall in no case be remitted unless the employer shall secure in a manner satisfactory to the commission the payment of all compensation as provided by the act, payable because of accidents to his employees prior to his so complying or shall pay into the state insurance fund the present value thereof, as computed by the commission as provided in section 27 of the act.

37. Commission to supply blanks. The commission shall prepare a full and complete set of blank forms as required by section 76 of the act and distribute the same or cause them to be distributed so that they may be readily available and especially to all employers who shall have insured under the provisions of section 50 of this act, that they may be able to keep on hand a sufficient supply thereof.

38. Expense accounts of commission. In view of the requirements of section 94 that after the year 1916 the expense of administering the state insurance fund shall annually be refunded to the state by it and that after such year also the expense of examination, determination and payment of claims shall be apportioned among the insurance carriers, including the state insurance fund, in proportion to the compensation paid by them, and be refunded annually to the state by them, the accounts shall be so kept during the years 1914, 1915 and 1916, as well as thereafter, in order that these various items of expense can be segregated, to the end that, when required, such segregation may be made readily and accurately and that

the burden of such expenses upon the state during such period may be correctly estimated.

39. Classifying employments of a single employer. The commission will classify all the employments of an employer when such are associated, in one group under the provisions of section 95 of the act for the purposes of the state insurance fund, under the provisions of section 96 of the act for associations for accident prevention and under the provisions of section 97 of the act for purposes of accounting and dividends; but in computing premiums, so far as may be deemed advisable, the payrolls of the different employments shall be dealt with separately and, if the businesses, trades or employments of the employer are dissociated and readily and completely separable, they may be classed each in its respective group for all purposes.

40. How interstate and foreign commerce employers may comply. The commission will upon application furnish blanks and prescribe methods by which employers engaged in interstate or foreign commerce and their employees working only in this state may by agreement accept and become bound by the provisions of the act, so far as not forbidden by any act of congress, in like manner and with the same effect in all respects as provided in the act for other employers and their employees; and upon the execution of such agreement, the return to the commission of such blanks duly filled out and signed and compliance with the methods prescribed by it, the commission may approve the same, upon which approval it shall go into effect.

41. Hours of sessions. The sessions of the commission commence every day at 10.30 o'clock a. m. and continue with such intermission or intermissions, if any, as the commission may order, until it shall by the vote of a majority of the members present adjourn for the day.

42. When physician's bill not to be considered. If an attending physician shall refuse to fill out, sign and forward the reports requested by the commission or to itemize his bill for fees or verify the same by his oath or affirmation, his claim for medical services to an injured employee shall not be considered for approval until he shall have complied with such requirement.

43. Employees insured in state fund. All policies of

the state insurance fund shall be issued so as to cover all the employees upon the premises, or at the plant or upon the business of the employer away from the plant; premiums shall be computed and collected upon a pay-roll including the salaries or wages of all such employees and compensation at the rates provided in the act shall be payable out of the state insurance fund, when and as such compensation shall be awarded by the commission and ordered to be paid, in respect of every employee to whom payment of compensation is so assured.

44. Premiums payable to state fund. The policies of the state insurance fund shall continue in force during successive periods of six months and the employer shall be liable for the premium therefor unless such employer, not being in arrears for premiums due the fund, shall within thirty days of the expiration of the then current six months' period give written notice to the commission of his intention to withdraw and shall also comply with subdivision two or three of section 50 of the act.

45. How disbursements from state fund made. All disbursements of compensation by the state insurance fund shall be made by voucher authorized by the commission and signed by any two members thereof and shall be paid out of such fund by the state treasurer upon the presentation of such vouchers, properly signed, witnessed and endorsed.

46. Monthly session to consider report of state fund. The commission shall devote the session in the second Wednesday of each month or so much of it and of as many other sessions as may be required, to consideration of a report of the transactions of the state insurance fund during the previous calendar month and during the expired portion of the calendar year including that month and of its financial condition, including its investments and its funds in hand available for investment; and shall make such orders concerning the transaction of the business of the state insurance fund and adopt such resolutions concerning the investment of its funds and the sale of its securities, in both cases subject to approval by the comptroller, as it may deem advisable.

47. Form of state fund accounts. The accounts of the state insurance fund shall be kept so as to comply with all the requirements of section 97 of the act and specifically so as to enable the receipts from each class and

the disbursements, including reserves, on its account and the amount so received from each employer and the disbursements, including reserve on his account to be separately set forth in the books of account with a view to ascertaining whether a dividend has been earned and is safely apportionable and, if so, among which insured employers of the class it should be apportioned.

48. Readjustment of premium payroll to state fund. The readjustment of the semi-annual premium paid in advance to the state insurance fund, required by subdivision 3 of section 97 of the act, shall be based upon the sworn statement of the employer as to the wage expenditure for such period of six months as required by section 101 of the act or upon an audit of his books by direction of the commission as provided for in such section or upon both such sworn statements and such audit, as the commission may, in its discretion, require.

49. Time for paying premiums to state fund. For every employer insuring with the state insurance fund from July 1, 1914, the advance semi-annual premium must be paid on or before such day as required by section 98 of the act and thereafter semi-annually within ten days after the mailing of the notice by the commission, specifying the amount of the same. For every other employer insuring with the state insurance fund the advance semi-annual premium must be paid on or before the day when such insurance is to go into force and thereafter semi-annually within ten days after the mailing of notice by the commission, specifying the amount of the same. Provided always that the commission may, in its discretion, extend the time for the payment of any premiums.

50. Repeal, amendment or adoption of rules. The rules of the commission are subject to repeal or amendment or to the adoption of any new rule or rules at any time by the vote of a majority of the commissioners present at any meeting.

RULE 51.

(Adopted January 21, 1915.)

Subrogation to Remedies of Employees.

Subdivision 1. Where the workman entitled to compensation be injured by the negligence or wrong of another not in the same employ elects to take compensation, such election shall be made by filing with the Commission a duly

verified claim for compensation containing an assignment of the cause of action against such other party to the State for the benefit of the State Insurance Fund, if compensation be payable therefrom, and otherwise to the person or association or corporation liable for the payment of such compensation.

Subdivision 2. Where the workman entitled to compensation be injured by the negligence or wrong of another not in the same employ elects to pursue his remedy against such other, he shall file with the Commission a notice of election to pursue his remedy against such other upon a blank form furnished by the Commission for such purpose. He shall also, if he desires to claim compensation for the deficiency, if any, between the amount of the recovery against such other person and the compensation provided or estimated by this chapter for such injuries, or compensation in case no recovery is made against such third party, file with the Commission, at the same time, a claim for such compensation, if any.

Subdivision 3. Where a workman entitled to compensation under this chapter be killed by the negligence or wrong of another not in the same employ, his dependents, if they elect to take compensation, shall file with the Commission a claim for compensation containing the assignment mentioned in subdivision one of this rule.

Subdivision 4. Where a workman entitled to compensation be killed by the negligence or wrong of another not in the same employ, his dependents, if they elect to pursue their remedy against such other, shall file with the Commission a notice of election to pursue such remedy against such other upon forms provided by the Commission for such purpose. Such dependents may, if they desire to claim compensation for the deficiency if any, between the amount of the recovery against such other person and the compensation provided or estimated by this chapter for such case, or compensation in case of no recovery against such other, at the same time, file with the Commission a claim for such compensation, if any.

Subdivision 5. Where the dependents of a workman entitled to compensation under this chapter in cases where such workman be killed by the negligence or wrong of another not in the same employ are minors *sui juris* such

election to take compensation and the assignment of the cause of action against such other mentioned in subdivision one of this rule, or such notice of election to pursue a remedy against such other, shall be made by such minor, and if not *sui juris*, shall be made on behalf of such minor by his or her duly appointed guardian, with permission of the court appointing such guardian. All minors under twelve years of age shall, for the purposes of this rule, be regarded as not *sui juris*.

See Part I, Section 24.

See also annotations to Section 28, the Workmen's Compensation Law.

ALPHABETICAL LIST OF HAZARDOUS EMPLOYMENTS COVERED BY THE WORKMEN'S COMPENSATION LAW

verified claim for compensation containing an assignment of the cause of action against such other party to the State for the benefit of the State Insurance Fund, if compensation be payable therefrom, and otherwise to the person or association or corporation liable for the payment of such compensation.

Subdivision 2. Where the workman entitled to compensation be injured by the negligence or wrong of another not in the same employ elects to pursue his remedy against such other, he shall file with the Commission a notice of election to pursue his remedy against such other upon a blank form furnished by the Commission for such purpose. He shall also, if he desires to claim compensation for the deficiency, if any, between the amount of the recovery against such other person and the compensation provided or estimated by this chapter for such injuries, or compensation in case no recovery is made against such third party, file with the Commission, at the same time, a claim for such compensation, if any.

Subdivision 3. Where a workman entitled to compensation under this chapter be killed by the negligence or wrong of another not in the same employ, his dependents, if they elect to take compensation, shall file with the Commission a claim for compensation containing the assignment mentioned in subdivision one of this rule.

Subdivision 4. Where a workman entitled to compensation be killed by the negligence or wrong of another not in the same employ, his dependents, if they elect to pursue their remedy against such other, shall file with the Commission a notice of election to pursue such remedy against such other upon forms provided by the Commission for such purpose. Such dependents may, if they desire to claim compensation for the deficiency if any, between the amount of the recovery against such other person and the compensation provided or estimated by this chapter for such case, or compensation in case of no recovery against such other, at the same time, file with the Commission a claim for such compensation, if any.

Subdivision 5. Where the dependents of a workman entitled to compensation under this chapter in cases where such workman be killed by the negligence or wrong of another not in the same employ are minors *sui juris* such

election to take compensation and the assignment of the cause of action against such other mentioned in subdivision one of this rule, or such notice of election to pursue a remedy against such other, shall be made by such minor, and if not *sui juris*, shall be made on behalf of such minor by his or her duly appointed guardian, with permission of the court appointing such guardian. All minors under twelve years of age shall, for the purposes of this rule, be regarded as not *sui juris*.

See Part I, Section 24.

See also annotations to Section 29, the Workmen's Compensation Law.

ALPHABETICAL LIST OF HAZARDOUS EMPLOYMENTS COVERED BY THE WORKMEN'S COMPENSATION LAW

ALPHABETICAL LIST OF HAZARDOUS EMPLOYMENTS COVERED BY THE WORKMEN'S COMPENSATION LAW.

NOTE. The following alphabetical list is not a list of hazardous industries. It includes in many cases only the hazardous branches or occupations of industries. For this reason in some industries only a part of the employees will come under the law. The name of the industry may not be included in this list while the names of hazardous occupations within such industry are included. In this connection see also Part I, Sections 3, 6, 7, 8, and 10.

(See also list of hazardous employments added by the Legislature at the 1916 session, page 200, post.

Employment.	Group No. in § 2 of Law.
Abattoirs	30
Acids, corrosive, manufacture of	25
Acids, non-corrosive, manufacture of	28
Adding machines, manufacture of	23
Agricultural implements, manufacture of	24
Alcohol, manufacture of	27
Ammonia, manufacture of	25
Ammunition, manufacture of.	25
Anchors, manufacture of	21
Artificial ice, manufacture of.	25
Artificial stone, manufacture of	42
Asphalt, manufacture of	19
Asphalted paper, manufacture of	26
Automobiles, manufacture of.	24
Baby carriages, toy, manufacture of	24
Bags, cloth, manufacture of	37
Bags, paper, manufacture of.	40
Bakeries	34
Baskets, manufacture of	17
Beds, metal, manufacture of	23
Bed springs, manufacture of.	16
Belting, manufacture of	32
Bicycles, manufacture of	23
Biscuits, manufacture of	34
Blankets, manufacture of	37
Bleaching	39
Boats, small, manufacture of.	16
Boilers, installation and covering of	42
Boilers, manufacture of	21
Bolts, manufacture of	23
Book-binding	40
Booming	14
Boots, manufacture of	32
Boxes, cardboard, manufacture of	40
Boxes, wooden and corrugated paper, manufacture of	17
Breweries	27
Brick, manufacture of	19
Brick-laying	42
Bridge construction, steel	42

Employment.	Group No. in § 2 of Law.
Bridges, construction, repair and demolition of	42
Brooms, manufacture of	36
Brushes, manufacture of	36
Buildings, construction, repair and demolition of	42
Building construction, steel	42
Buttons, manufacture of	23
Cables, underground, laying and repair of	13
Cables, manufacture of	21
Caisson, construction	11
Calcium carbide, manufacture of	19
Cameras, photographic, manufacture of	23
Candles, manufacture of	28
Canning or preparation of fruit, vegetables, fish or food stuffs	33
Canoes, manufacture of	16
Canvas, manufacture of	37
Caps, manufacture of	38
Cardboard boxes, manufacture of	40
Cargoes, loading or unloading of	10
Carpentry, structural	42
Carpet sweepers, manufacture of	17
Carpets, manufacture of	37
Carriage mountings, manufacture of	23
Carriages, manufacture of	24
Carriages, toy baby, manufacture of	24
Car shops, railway, operation, construction and repair of	3
Car shops, other	4
Cars, operation of, otherwise than on tracks	41
Cash registers, manufacture of	23
Castings, manufacture of	21
Castings, small, manufacture of	23
Cattle foods, manufacture of	29
Celluloid, manufacture of	25
Cement, manufacture of	19
Cereals, manufacture of	29
Charcoal, manufacture of	25
Chemical preparations, non-corrosive, manufacture of	28
Chemicals, manufacture of	28
Chemicals, dangerous, manufacture of	25
Cheese boxes, manufacture of	17
Cigarettes, manufacture of	35
Cigars, manufacture of	35
Clay pits	19
Cleaning	39
Cloth, manufacture of	37
Clothing, men's or women's, manufacture of	38
Coal, cargoes of	10
Coffins, manufacture of	16
Collars, manufacture of	38
Color, manufacture of	26
Compressed air, work under	13
Concrete blocks, manufacture of	42
Concrete work	42
Condiments, manufacture of	34
Confectionery, manufacture of	34
Cordage, manufacture of	36
Corrosive acids or salts, manufacture of	25
Corsets, manufacture of	38
Crackers, manufacture of	34
Cutlery, manufacture of	23
Dangerous chemicals, manufacture of	25
Decorating	42
Dining car employees	1
Distilleries	27
Door factories	17
Door screens, manufacture of	17
Dredging	11
Drugs, manufacture of	28
Dyeing	39
Dyes, manufacture of	28
Dynamos, construction, installation, or operation of	12
Electric fixtures, manufacture of	23
Electric light lines, construction, installation or operation of	12
Electric power lines, construction, installation or operation of	12
Electric railways, operation, construction and repair of	1
Electrotyping	40
Elevators, installation of	42
Elevators, grain, operation of	29
Embossing	40
Engines, installation of	42
Engines, heavy, manufacture of	21
Engines, propelled by steam, gas, etc., operation of	41
Engines, stationary, operation of	22

Employment.	Group No. in § 2 of Law.
Engines, traction, manufacture of	24
Excavation	13
Excelsior, manufacture of	14
Explosives, manufacture of	25
Express car employees	1
Extracts, manufacture of	28
Fabrics, manufacture of	37
Felt, manufacture of	37
Fertilizers, manufacture of	28
Fibre, manufacture of	36
Fire escapes, installation of	42
Fire-proofing, manufacture of	19
Fish, canning or preparation of	33
Fixtures, manufacture of sanitary, water, gas or electric.	23
Flax mills	37
Food stuffs, canning or preparation of	33
Forgings, manufacture of	21
Forgings, small, manufacture of	23
Foundries, iron, steel, or metal	21
Freight, cargoes of, handling of	10
Fruit, canning or preparation of	33
Furnaces, manufacture of	21
Furniture, manufacture of	16
Furs, manufacture of	38
Garbage disposal plants	28
Gas fixtures, manufacture of	23
Gas, manufacture of	25
Gasoline, manufacture of	25
Glass, manufacture of	20
Glass products, manufacture of	20
Glassware, manufacture of	20
Gloves, manufacture of	32
Glue, manufacture or preparation of	30
Grain, cargoes of, handling of	10
Grain elevators, operation of.	29
Gravel pits	19
Gun powder, manufacture of.	25
Hardware, manufacture of	23
Harness, manufacture of	32
Hats, manufacture of	38
Headings, manufacture of	14
Heating engineering	42
Hemp products, manufacture of	36
Horses, operation of vehicles drawn by	41
Hose, rubber, manufacture of	32
Hosiery, manufacture of	37
Ice, artificial, manufacture of	25
Implements, agricultural, manufacture of	24
Incline railways, operation, construction and repair of.	1
Ink, printing, manufacture of	26
Instruments, manufacture of.	23
Interior woodwork, manufacture of	16
Iron foundries	21
Iron, manufacture of	21
Japans, manufacture of	26
Kilns, lime	19
Knitting manufactories	37
Lath mills	14
Laundries, power	39
Leather goods and products, manufacture of	32
Lime kilns	19
Liquors, spirituous or malt, manufacture of	27
Lithographing	40
Locomotives, manufacture of.	21
Logging	14
Longshore work	10
Lumber, cargoes of, handling of	10
Lumbering	14
Machine shops, railways, operation, construction and repair	3
Machine shops, other	4
Machinery, manufacture of	21
Machinery, heavy, installation of	42
Machines, light, manufacture of	23
Malt liquors, manufacture of.	27
Manila products, manufacture of	36
Marble works	42
Mason work	42
Mattresses, manufacture of	16
Meat products, manufacture or preparation of	30
Meats, manufacture or preparation of	30
Medicines, manufacture of	28
Merchandise, cargoes of, handling of	10

Employment.	Group No. in § 2 of Law.
Metal, structural, manufacture of	21
Metal beds, manufacture of	23
Metal foundries	21
Metal toys, manufacture of	23
Metal wares, manufacture of	23
Metals, preparation of	18
Millings	29
Mineral water, manufacture of	27
Minerals, preparation of	18
Mining	18
Motor trucks, manufacture of	24
Mouldings, manufacture of	17
Mules, operation of vehicles drawn by	41
Nails, manufacture of	23
Oil, manufacture of	26
Ore, cargoes of, handling of	10
Ores, reduction of	18
Organs, manufacture of	16
Packing houses	30
Paint, manufacture of	26
Painting	42
Paper boxes, corrugated, manufacture of	17
Paper, manufacture of	40
Paper, tarred, pitched or asphalted, manufacture of	26
Paper mills	15
Parlor car employees	1
Paving	18
Paving blocks, manufacture of	19
Paving material, manufacture of	19
Perfumes, manufacture of	28
Petroleum, manufacture of	25
Petroleum products, manufacture of	25
Pharmaceutical preparations, manufacture of	28
Photo-engraving	40
Photographic cameras and supplies, manufacture of	23
Piano actions, manufacture of	16
Pianos, manufacture of	16
Pickle factories	33
Pile driving	11
Pipes, installation and covering of	42
Pipes, laying and repair of, underground	13
Pipes, manufacture of	21
Pitched paper, manufacture of	26
Pits, sand, shale, clay or gravel	19
Planing mills	17
Plastering	42
Plumbing	42
Porcelain, manufacture of	20
Pottery, manufacture of	20
Powder, gun, manufacture of	25
Power plants, railway, operation, construction and repair of	3
Power plants, other	4
Power, transmission lines, construction, installation or operation of	12
Printers' rollers, manufacture of	26
Printing	40
Printing ink, manufacture of	26
Pulp mills	15
Quarries	19
Rafting	14
Rails, manufacture of	21
Railway car shops, machine shops, steam and power plants, operation, construction and repair	3
ailways, operation, construction and repair of, whether operated by steam, electric or other motive power, including street railways and incline railways	1, 2
Rattan ware, manufacture of	16
Reduction of ores	18
Refineries, sugar	33
Renovating	42
River-driving	14
Robes, manufacture of	33
Rollers, when propelled by steam, gas, etc., operation of	41
Rolling mills	21
Roofing	42
Ropes, manufacture of	36
Rubber goods, manufacture of	32
Rubber shoes, manufacture of	32
Saddlery, manufacture of	32
Safes, manufacture of	31
Salts, corrosive, manufacture of	25
Sand pits	19
Sanitary engineering	42
Sanitary fixtures, manufacture of	23
Sash and door factories	17
Saw mills	14

Employment.	Group No. in § 2 of Law.
Screens, manufacture of	28
Screens, window and door, manufacture of	17
Sewer construction	18
Shades, window, manufacture of	17
Shaft sinking	18
Shafting, manufacture of	21
Shale pits	19
Sheet metal, manufacture of	21
Sheet metal products, manufacture of	28
Sheet metal work	42
Shingle mills	14
Shipbuilding, construction and repair in a ship-yard or elsewhere (*cf.* vessels)	9
Shirts, manufacture of	38
Shoddy, manufacture of	37
Shoe blacking or polish, manufacture of	28
Shoes, manufacture of	32
Sleeping car employees	1
Sleighs, manufacture of	24
Sleighs, toy, manufacture of	24
Smelting	18
Soaps, manufacture of	28
Soda waters, manufacture of	27
Spinning manufactories	37
Spices, manufacture of	34
Spirituous liquors, manufacture of	27
Spokes, manufacture of	14
Stationary engines and boilers, operation and repair of	22
Stationery, manufacture of	40
Staves, manufacture of	14
Steam and power plants, operation, construction and repair of	3, 4
Steam railways, operation, construction and repair of	1
Steel building and bridge construction	42
Steel foundries	21
Steel, structural, manufacture of	21
Stereotyping	40
Stone cutting or dressing	42
Stone, artificial, manufacture of	42
Stone-setting	42
Storage	29
Storage, place, longshore work in	10
Stoves, manufacture of	21
Street railways, operation, construction and repair of	1
Structural carpentry	42
Structural steel, manufacture of	21
Subaqueous construction	11
Subway construction	18
Sugar refineries	33
Tanneries	31
Tar, manufacture of	26
Tarred paper, manufacture of	26
Telegraph lines and wires, operation, construction and repair of	6, 7
Telephone lines and wires, operation, construction and repair of	5, 7
Terra-cotta, manufacture of	19
Textiles, manufacture of	37
Thread, manufacture of	37
Threshing machines, manufacture of	24
Tile, manufacture of	19
Tile-laying	42
Tires, rubber, manufacture of	32
Tobacco, manufacture of	35
Tobacco products, manufacture of	35
Toilet preparations, manufacture of	28
Tools, manufacture of	28
Toy wagons, sleighs or baby carriages, manufacture of	24
Toys, manufacture of metal	28
Toys, manufacture of wooden	17
Traction engines, manufacture of	24
Trucks, operation of	41
Trunks, manufacture of	32
Tubing, manufacture of	21
Tubing, rubber, manufacture of	32
Tunneling	18
Turpentine, manufacture of	26
Typewriters, manufacture of	28
Umbrellas, manufacture of	32
Upholstering	16
Utensils, manufacture of	28
Valises, manufacture of	32
Varnish, manufacture of	26
Vegetables, canning or preparation of	33
Vehicles, manufacture of	24
Vehicles, operation of	41
Veneer, manufacture of	14
Vessels, operation and repair of	8

Employment.	Group No. in § 2 of Law.
Wagons, manufacture of	24
Wagons, toy, manufacture of.	24
Wagons, operation of	41
Wall-paper, manufacture of	40
Warehouse, longshore work in	10
Warehousing	29
Water fixtures, manufacture of	23
Waters, manufacture of soda	27
Weaving manufactories	37
Well digging	13
White wear, manufacture of	38
Wicker ware, manufacture of	16
Window screens, manufacture of	17
Window shades, manufacture of	17
Wine, manufacture of	27
Wire goods, manufacture of	23
Wires, underground, laying and repair	13
Wires, manufacture of	21
Wooden boxes, manufacture of	17
Wooden toys, articles and wares, manufacture of	17
Woodwork, interior, manufacture of	16
Yarn, manufacture of	37

ALPHABETICAL LIST OF HAZARDOUS EMPLOYMENTS ADDED BY CHAPTER 622, LAWS OF 1916, EFFECTIVE JUNE 1, 1916.

Articles of bone, ivory and shell	23
Articles from textiles and fabrics	38
Asbestos	19
Ashes removal	13
Bark mills	14
Barrels, manufacture of	14
Blacksmiths	24
Boarding stables	41
Bone articles, manufacture of	23
Bottling	27
Cork cutting	17
Curb construction or repair	13
Dairy products, manufacture of	33
Elevators	22
Engraving	40
Fabrics, articles from, manufacture of	38
Films, manufacture of	40
Freight elevators, operation of	22
Furriers	32
Garage	41
Garbage, removal	13
Gas wells	18
Gelatine, manufacture of	30
Glazing	42
Gold ware, manufacture of	23
Heating	22
Horseshoers	24
Ice distribution	25
Ice harvesting	25
Ice storage	25
Ink, manufacture of	26
Ivory articles, manufacture of	23
Jewelry, manufacture of	23
Junk dealers	42
Kegs, manufacture of	14
Lighting	22
Livery stables	41
Lumber yards	14
Machine shops, inc. repairs	21
Marine wrecking	9
Meat markets	30
Movers of all kinds	41
Moving picture machines, manufacture of	40
Municipalities, any hazardous employments carried on by	43
Oil wells	18
Papering	42
Passenger elevators, operation of	22
Paste, manufacture of	30
Picture hanging	42
Plate ware, manufacture of	23
Public garages	41
Repair of,	
Railways	2
Telephone & telegraph lines	7
Electric light power lines, dynamos or appliances and transmission lines	12
Sewers, subways	13
Steel buildings, elevators	42

Employment.	Group No. in § 2 of Law.
Subaqueous construction....	11
Caisson construction	11
Road building or repair	13
Sales stables	41
Salvage of buildings and contents	42
Sanitary lighting, installation or repair	42
Screws, manufacture of	23
Sewerage disposal plants	28
Shell articles, manufacture of	23
Sidewalk construction or repair	13
Silver ware, manufacture of..	23
Snow removal	13
Stables	41
State, any hazardous employments carried on by	43
Stone crushing or grinding ...	19
Storage for hire	29
Storage of all kinds	29
Street cleaning	13
Structures, construction, repair and demolition	42
Textiles, articles from, manufacture of	38
Tubs, manufacture of	14
Vats, manufacture of	14
Waterwork, operation of	13
Wax, manufacture of	30
Window cleaning	22

APPENDIX

EMPLOYERS' LIABILITY ACT AND ELECTIVE COMPENSATION LAW.

SEC. 64 OF THE RAILROAD LAW—INJURIES TO RAILROAD EMPLOYEES.

ART. 1, SEC. 19, STATE CONSTITUTION—AUTHORIZING THE COMPENSATION LAW.

ART. 1, SEC. 18, STATE CONSTITUTION—RELATING TO DEATH CASES.

SEC. 1902, CODE OF CIVIL PROCEDURE—RELATING TO DEATH CASES.

FEDERAL EMPLOYERS' LIABILITY ACT.

EMPLOYERS' LIABILITY ACT AND ELECTIVE COMPENSATION LAW.

The Labor Law.

Chapter 31 of the Consolidated Laws.

Article 14.

NOTE: The provisions of Section 200 to 204 inclusive of this article of the Labor Law have no application to the employments enumerated in Section 2 of the Workmen's Compensation Law, as to any accident occurring since July 1, 1914.

Sections 205 to 212 inclusive comprise the Elective Compensation Statute. These sections have no application except to the employments which are omitted from Section 2 of the Workmen's Compensation Law, and so far as is consistent therewith are superseded by the elective provisions added to the compensation law in 1916.

Section 200. Employer's liability for injuries.
201. Notice to be served.
202. Assumption of risks; contributory negligence, when a question of fact.
202-a. Trial; burden of proof.
203. Defense; insurance fund.
204. Existing rights of action continued.
205. Consent by employer and employee to compensation plan.
206. Liability to pay compensation; notice of accident.
207. Amount of compensation; persons entitled; physical examination.
208. Settlement of disputes.
209. Preferential claim; not assignable or subject to attachment; attorney's fee.
210. Cancellation of consent.
211. Reports of compensation plan.
212. Reports by employer.

§ 200. Employer's liability for injuries. When personal injury is caused to an employee who is himself in the exercise of due care and diligence at the time:

1. By reason of any defect in the condition of the ways, works, machinery, or plant, connected with or used in the business of the employer which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, machinery, or plant, were in proper condition. (Subd. 1 am'd by L. 1910, Ch. 352.)

2. By reason of the negligence of any person in the service of the employer intrusted with any superintendence or by reason of the negligence of any person intrusted with authority to direct, control or command any employee in the performance of the duty of such employee. The employee, or in case the injury results in death, the executor or administrator of a deceased employee who has left him surviving a husband, wife or next of kin, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer nor engaged in his work. The provisions of law relating to actions for causing death by negligence, so far as the same are consistent with this act, shall apply to an action brought by an executor or administrator of a deceased employee, suing under the provisions of this article. If an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work, or if such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for the injuries to the employees of such contractor or subcontractor, caused by any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer or are furnished by him, and if such defect arose, or had not been discovered or remedied, through the negligence of the employer, or of some person intrusted by him with the duty of seeing that they were in proper condition. (Sub. 2 am'd by L. 1910, Ch. 352.)

For definition of the word "plant," see

Wiley vs. Solvay Process Company, 215 N. Y. 584.

Lipstein vs. Provident Loan Society, 154 App. Div. 782.

Fresusk vs. Pittsburg Contracting Co., 159 App. Div. 356.

Kenz vs. Bernheimer & Schwartz Pils. Brewing Co., 162 App. Div. 777.

Drury vs. American Fruit Product Co., 163 App. Div. 509.

For the responsibility of the owner for the safety of an employee of a contractor, see

Kenz vs. B. & S. Pilsner Brewing Co., 162 App. Div. 777.

§ 201. **Notice to be served.** No action for recovery of compensation for injury or death under this article shall be maintained unless notice of the time, place and cause of the injury is given to the employer within one hundred and twenty days and the action is commenced within one year after the occurrence of the accident causing the injury or death. The notice required by this section shall be in writing and signed by the person injured or by some one in his behalf, but if from physical or mental incapacity it is impossible for the person injured to give notice within the time provided in this section, he may give the same within ten days after such incapacity is removed. In case of his death without having given such notice, his executor or administrator may give such notice within sixty days after his appointment, but no notice under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury if it be shown that there was no intention to mislead and that the party entitled to notice was not in fact misled thereby. If such notice does not apprise the employer of the time, place or cause of injury, he may, within eight days after service thereof, serve upon the sender a written demand for a further notice, which demand must specify the particular in which the first notice is claimed to be defective, and a failure by the employer to make such demand as herein provided shall be a waiver of all defects that the notice may contain. After service of such demand as herein provided, the sender of such notice may at any time within eight days thereafter

serve an amended notice which shall supersede such first notice and have the same effect as an original notice hereunder. The notice required by this section shall be served on the employer, or if there is more than one employer, upon one of such employers, and may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served. The notice or demand may be served by post by letter addressed to the person on whom it is to be served, at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post. When the employer is a corporation, notice shall be served by delivering the same or by sending it by post addressed to the office or principal place of business of such corporation. (As am'd by L. 1910, Ch. 352.)

In the notice to serve pursuant to this section the accident should be so identified that the master's attention is called to the exact occurrence.

Logerto vs. Central Building Co., 198 N. Y. 390.

If the notice is defective, the case will be treated as a common law action and not within the Employers' Liability Act.

Jackson vs. Green, 201 N. Y. 76.

For other cases upon the sufficiency of the notice, see

Bertolami vs. U. N. & C. Co., 198 N. Y. 71.

Hurley vs. Alcott, 198 N. Y. 132.

Rodzborski vs. American Sugar Refining Co., 210 N. Y. 262.

For liability where notice under this section is waived, see

Dailey vs. Stoll, 211 N. Y. 74.

§ 202. Assumption of risks; contributory negligence, when a question of fact. An employee by entering upon or continuing in the service of the employer shall be presumed to have assented to the necessary risks of the occupation or employment and no others. The necessary risks of the occupation or employment shall, in all cases arising after this article takes effect, be considered as including those risks, and those only, inherent in the nature of the business which remain after the employer has exercised

due care in providing for the safety of his employees, and has complied with the laws affecting or regulating such business or occupation for the greater safety of such employees. In an action brought to recover damages for personal injury or for death resulting therefrom received after this act takes effect, owing to any cause, including open and visible defects, for which the employer would be liable but for the hitherto available defense of assumption of risk by the employee, the fact that the employee continued in the service of the employer in the same place and course of employment after the discovery by such employee, or after he had been informed of the danger of personal injury therefrom shall not be, as matter of fact or as matter of law, an assumption of the risk of injury therefrom, but an employee, or his legal representative, shall not be entitled under this article to any right of compensation or remedy against the employer in any case where such employee knew of the defect or negligence which caused the injury and failed, within a reasonable time, to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, or who had intrusted to him some superintendence, unless it shall appear on the trial that such defect or negligence was known to such employer, or superior person, prior to such injuries to the employee; or unless such defect could have been discovered by such employer by reasonable and proper care, tests or inspection. (As am'd by L. 1910, Ch. 352.)

Assumption of risk by the employee is made a question of fact by this section and in an action brought under the Employers' Liability Act the plaintiff cannot be said to have assumed the risk of the accident as a matter of law.

Clark vs. N. Y. Central & Hudson R. R. R. Co., 191 N. Y. 416.

The rule established by this section in relation to the assumption of risk does not apply to an action brought against an employer under common law principles.

Colleri vs. Turner, 215 N. Y. Memo. 675.

§ 202-a. **Trial; burden of proof.** On the trial of any action brought by an employee or his personal representative to recover damages for negligence arising out of and

in the course of such employment, contributory negligence of the injured employee shall be a defense to be so pleaded and proved by the defendant. (Added by L. 1910, Ch. 352.)

The rule as to contributory negligence as established by this section applies to all cases arising under the Labor Law as well as to cases arising under Article 14.

Hubbell vs. Pioneer Paper Co., 160 App. Div. 356.

§ 203. Defense; insurance fund. An employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employee for personal injuries, for which compensation may be recovered under this article, or to any relief society or benefit fund created under the laws of this state, may prove in mitigation of damages recoverable by an employee under this article such proportion of the pecuniary benefit which has been received by such employee from such fund or society on account of such contribution of the employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto.

An employee may release an employer from liability in consideration of benefits from a relief fund.

Coleisi vs. Pennsylvania R. R. Co., 208 N. Y. 275.

But this does not relate to a release from payment of compensation, in connection with which see Sections 30, 31 and 32 of the Workmen's Compensation Law.

§ 204. Existing rights of action continued. Every existing right of action for negligence or to recover damages for injuries resulting in death is continued and nothing in this article contained shall be construed as limiting any such right of action, nor shall the failure to give the notice provided for in section two hundred and one of this article be a bar to the maintenance of a suit upon any such existing right of action.

§ 205. Consent by employer and employee to compensation plan. When and if any employer in this state and any of his employees shall consent to the compensation plan described in sections two hundred and six to two hundred and twelve, inclusive, of this article, hereinafter referred to as the plan, and shall signify their consent thereto in writing signed by each of them or their authorized agents, and acknowledged in the manner prescribed by law or taking the acknowledgment of a conveyance of real

property, and such writing is filed with the county clerk of the county in which it is signed by the employee, then so long as such consent has not expired or been canceled as hereinafter provided, such employee, or in case injury to him results in death, his executor or administrator, shall have no other right of action against the employer for personal injury or death of any kind, under any statute or at common law, save under the plan so consented to, except where personal injury to the employee is caused in whole or in part by the failure of the employer to obey a valid order made by the commissioner of labor or other public authority authorized to require the employer to safeguard his employees, or where such injury is caused by the serious or wilful misconduct of the employer. In such excepted cases thus described, no right of action which the employee has at common law or by any other statute shall be affected or lost by his consent to the plan, if such employee, or in case of death his executor or administrator, commences such action before accepting any benefit under such plan or giving any notice of injury as provided in section two hundred and six hereof. The commencing of any legal action whatsoever at common law or by any statute against the employer on account of such injury, except under the plan, shall bar the employee, and in the event of his death his executors, administrators, dependents and other beneficiaries, from all benefit under the plan. This section and sections two hundred and six to two hundred and twelve, inclusive, of this article shall not apply to a railroad corporation, foreign or domestic, doing business in this state, or a receiver thereof, or to any person employed by such corporation or receiver. (Added by L. 1910, Ch. 352.)

§ 206. Liability to pay compensation; notice of accident. If personal injury by accident arising out of and in the course of the employment is caused to the employee, the employer shall, subject as hereinafter mentioned, be liable to pay compensation under the plan at the rates set out in section two hundred and seven of this article; provided that the employer shall not be liable in respect of any injury which does not disable the employee for a period of at least two weeks from earning full wages at the work at which he was employed, and that the employer shall not be liable in respect of any injury to the employee which is caused by the serious and wilful misconduct of that em-

ployee. No proceedings for recovery under the plan provided hereby shall be maintained unless notice of the accident has been given to the employer as soon as practicable after the happening thereof and before the employee has voluntarily left the employment in which he was injured and during such disability, and unless claim for compensation with respect to the accident has been made within six months from the occurrence of the accident, or in the case of death of the employee, or in the event of his physical or mental incapacity within six months after such death or removal of such physical or mental incapacity, or in the event that weekly payments have been made under the plan, within six months after such payments have ceased; but no want of or defect or inaccuracy of a notice shall be a bar to the maintenance of proceedings under the plan unless the employer proves that he is prejudiced by said want, defect or inaccuracy. Notice of the accident shall apprise the employer of the claim for compensation under this plan and shall state the name and address of the employee injured, the date and place of the accident and in simple language the cause thereof. The notice may be served personally or by sending it by mail in a registered letter addressed to the employer at his last known residence or place of business. (Added by L. 1910, Ch. 352.)

§ 207. Amount of compensation; persons entitled; physical examination. The amount of compensation under the plan shall be: 1. In case death results from injury:

(a) If the employee leaves a widow or next of kin at the time of his death wholly dependent on his earnings, a sum equal to twelve hundred times the daily earnings of the employee at the rate at which he was being paid by the employer at the time of the accident, but not more in any event than three thousand dollars. Any weekly payments previously made under the plan shall be deducted in ascertaining such amount payable on death.

(b) If such widow or next of kin or any of them are in part only dependent upon his earnings, such sum not exceeding that provided in subdivision a as may be determined to be reasonable and proportionate to the injury to such dependents.

(c) If he leaves no widow, or next of kin so dependent in whole or in part, the reasonable expenses of his medical attendance and burial, not exceeding one hundred dollars. Whatever sum may be determined to be payable under the

plan, in case of death of the injured employee, shall be paid to his legal representative for the benefit of such dependents, or if he leaves no such dependents, for the benefit of the person to whom the expenses of medical attendance and burial are due.

2. Where total or partial incapacity for work at any gainful employment results to the employee from the injury, a weekly payment commencing at the end of the second week after the injury and continuing during incapacity, subject as herein provided, not exceeding fifty per centum of his average weekly earnings when at work on full time during the preceding year during which he shall have been in the employment of the same employer, or if he shall have been employed less than a year, then a weekly payment of not exceeding three times the average daily earnings on full time for such less period.

In fixing the amount of the weekly payment, regard shall be had to any payment, allowance or benefit which the workman may have received from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident but shall amount to one-half of such difference. In no event shall any weekly payment payable under the plan exceed ten dollars per week or extend over more than eight years from the date of the accident. Any person entitled to receive weekly payments under the plan is required, if requested by the employer, to submit himself for examination by a duly qualified medical practitioner or surgeon provided and paid for by the employer, at a time and place reasonably convenient for the employee, within three weeks after the injury, and thereafter at intervals not oftener than once in six weeks. If the workman refuses so to submit or obstructs the same, his right to weekly payments shall be suspended until such examination shall have taken place, and no compensation shall be payable under the plan during such period. In case an injured employee shall be mentally incompetent at the time when any right or privilege accrues to him under the plan, a committee or guardian of the incompetent appointed pursuant to law may, on behalf of such incompetent, claim and exercise any such

right or privilege with the same force and effect as if the employee himself had been competent and had claimed or exercised any such right or privilege; and no limitation of time herein provided for shall run so long as said incompetent employee has no committee or guardian. (Section 207 added by L. 1910, Ch. 352.)

§ 208. Settlement of disputes. Any question of law or fact arising in regard to the application of the plan in determining the compensation payable thereunder or otherwise shall be determined either by agreement or by arbitration as provided in the code of civil procedure, or by an action at law as herein provided. In case the employer shall be in default in any of his obligations to the employee under the plan, the injured employee or his committee or guardian, if such be appointed, or his executor or administrator, may then bring an action to recover compensation under the plan in any court having jurisdiction thereof as on a written contract. Such action shall be conducted in the same manner as an action at law for the recovery of damages for breach of a written contract, and shall for all purposes, including the determination of jurisdiction, be deemed such an action. The judgment in such action, in favor of the plaintiff, shall be for a lump sum equal to the amount of the payments then due and prospectively due under the plan. In such action by an executor or administrator the judgment may provide the proportions of the award or the costs to be distributed to or between the several dependents. If such determination is not made it shall be determined by the surrogate's court by which such executor or administrator is appointed, in accordance with the terms of this article on petition of any party on such notice as such court may direct. (Added by L. 1910, Ch. 352.)

§ 209. Preferential claim; not assignable or subject to attachment; attorney's fees. Any person entitled to weekly payments under the plan against any employer shall have the same preferential claim therefor against the assets of the employer as now allowed by law for a claim by such person against such employer for unpaid wages or personal services. Weekly payments due under the plan shall not be assignable or subject to attachment, levy or execution. No claim of an attorney for any contingent interest in any recovery under the plan for services in securing such recovery shall be an enforceable lien thereon, un-

less the amount of the same be approved in writing by a justice of the supreme court, or in case the same is tried in any court, before the justice presiding at such trial. (Added by L. 1910, Ch. 352.)

§ 210. **Cancellation of consent.** When a consent to the plan shall have been filed in the office of the county clerk as herein provided, it shall be binding upon both parties thereto as long as the relation of employer and employee exists between the parties, and expire at the end of such employment, but it may at any time be canceled on sixty days' notice in writing from either party to the other. Such notice of cancellation shall be effective only if served personally or sent by registered letter to the last known post-office address of the party to whom it is addressed, but no notice of cancellation shall be effective as to a claim for injury occurring previous thereto. (Added by L. 1910, Ch. 352.)

§ 211. **Reports of compensation plan.** Each employer who shall sign with any employee a consent to the plan shall, within thirty days thereafter, file with the commissioner of labor a statement thereof, signed by such employer, which shall show (a) the name of the employer and his post-office address, (b) the name of the employee and his last known post-office address, (c) the date of, and office where the original consent is filed, (d) the weekly wage of the employee at the time the consent is signed; unless such statement is duly filed, such consent of the employee shall not be a bar to any proceeding at law commenced by the employee against the employer. (Added by L. 1910, Ch. 352.)

§ 212. **Reports by employer.** Each employer of labor in this state who shall have entered into the plan with any employee shall, on or before the first day of January, nineteen hundred and eleven, and thereafter and at such times as may be required by the commissioner of labor, make a report to such commissioner of all amounts, if any, paid by him under such plan to injured employees, stating the name of such employees, and showing separately the amounts paid under agreement with the employees, and the amounts paid after proceedings at law, and the proceedings at law under the plan then pending. Such reports shall be verified by the employer or a duly authorized agent in the same manner as affidavits. (Added by L. 1910, Ch. 352.)

INJURIES TO RAILROAD EMPLOYEES

The Railroad Law, Section 64.

Chapter 49 of the Consolidated Laws of the State of New York.

§ 64. **Injuries to employees.** In all actions against a railroad corporation, foreign or domestic, doing business in this state, or against a receiver thereof, for personal injury to, or death resulting from personal injury of any person, while in the employment of such corporation, or receiver, arising from the negligence of such corporation or receiver or of any of its or his officers or employees, every employee, or his legal representatives, shall have the same rights and remedies for an injury, or for death, suffered by him, from the act or omission of such corporation or receiver or of its or his officers or employees, as are now allowed by law, and, in addition to the liability now existing by law, it shall be held in such actions that persons engaged in the service of any railroad corporation, foreign or domestic, doing business in this state, or in the service of a receiver thereof, who are intrusted by such corporation or receiver, with the authority of superintendence, control or command of other persons in the employment of such corporation or receiver, or with the authority to direct or control any other employee in the performance of the duty of such employee, or who have, as a part of their duty, for the time being, physical control or direction of the movement of a signal, switch, locomotive engine, car, train or telegraph office, are vice-principals of such corporation or receiver, and are not fellow-servants of such injured or deceased employee. If an employee, engaged in the service of any such railroad corporation, or of a receiver thereof, shall receive any injury by reason of any defect in the condition of the ways, works, machinery, plant, tools or implements, or of any car, train, locomotive or attachment thereto belonging, owned or operated, or being run and operated by such corporation or receiver, when such defect could have been discovered by such corporation or receiver, by reasonable and proper care, tests or inspection, such corporation or receiver shall

be deemed to have had knowledge of such defect before and at the time such injury is sustained; and when the fact of such defect shall be proved upon the trial of any action in the courts of this state, brought by such employee or his legal representatives, against any such railroad corporation or receiver, on account of such injuries so received, the same shall be prima facie evidence of negligence on the part of such corporation or receiver. This section shall not affect actions or causes of action existing on May twenty-ninth, nineteen hundred and six; and no contract, receipt, rule or regulation between an employee and a railroad corporation or receiver, shall exempt or limit the liability of such corporation or receiver from the provisions of this section.

This section of the State Railroad Law is superseded by the Federal Employers' Liability Act, which is paramount and exclusive where the railroad employee, at the time of the accident, is engaged in interstate commerce.

Second Employers Liability Cases, 223 U. S. 1.
Burnett vs. Erie R. R. Company, 159 App. Div. 712.

As railroad employees engaged in intrastate work are covered by Groups 1, 2 and 3 of Section 2 of the Workmen's Compensation Law, the remedy of which is exclusive, Section 64 of the Railroad Law has become obsolete and inoperative as to any injury received by a railroad employee subsequent to July 1, 1914. Its only application would come in intrastate cases where the railroad company had not complied with Section 50 of the compensation law.

(For the leading cases as to the distinction between interstate commerce and intrastate commerce, see Part I, Section 22. See also annotations to Section 114, the Workmen's Compensation Law.)

CONSTITUTIONAL PROVISIONS

State Constitution, Article I, Section 19, authorizing the enactment of the Workmen's Compensation Law.

§ 19. Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer. (Section 19 adopted Nov. 4, 1913; in effect Jan. 1, 1914.)

State Constitution, Article I, Section 18.

Injuries Resulting in Death.

§ 18. The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation.

CODE PROVISIONS

Code of Civil Procedure, Section 1902.

Injuries Resulting in Death.

§ 1902. Action for causing death by negligence, etc. The executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the husband, wife or next of kin, do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit. (As amended by Chap. 221, Laws of 1915.)

For distribution of damages recovered under this section, see Code of Civil Procedure, Section 1903.

For actions to recover damages in death cases not covered by the Compensation Law, see Part I, Section 14.

In an action to recover damages for causing death the contributory negligence of the deceased is now a defense which must be pleaded and proven by the defendant. Code of Civil Procedure (Sec. 841 b.)

FEDERAL EMPLOYERS' LIABILITY ACT

Federal Employers' Liability Act.

(35 Stat. L. 65)

Approved, April 22, 1908.

An Act Relating to the liability of common carriers by railroad to their employees in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

SEC. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

"Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and no case arising under this act and brought in any state court of

competent jurisdiction shall be removed to any court of the United States." (Sub'd. 6, amended by H. R. 17263, Approved, April 5, 1910.)

SEC. 7. That the term "common carrier" as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

SEC. 8. That nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled "An act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employees," approved June eleventh, nineteen hundred and six.

SEC. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury. (As added by H. R. 17263, approved April 5, 1910.)

This act supersedes the Compensation Law and all other state laws where the railroad employee is engaged in interstate commerce and the injury is caused by or attributable to the negligence of the railroad company.

For the leading cases upon the distinction between interstate and intrastate commerce, see Part I, Section 22.

See also annotations to Sec. 114, The Workmen's Compensation Law.

TABLE OF CASES

A

PAGE

Adler, Sam'l, deceased, Matter of vs. Thomashefsky Theatre Co., Claim No. 52487, Work. Comp. Com..... 91
Albanese vs. Stewart, 78 Misc. Rep. (N. Y.) 581 86
Anderson, Andrews J., vs. American Mfg. Co., Claim No. 13861, St. Ind. Com., March 20, 1916..... 125
Atlantic Transport Co., vs. Imbrovek, 234 U. S. 52..38, 77
Aylesworth, Matter of vs. Phoenix Cheese Co., 170 App. Div. 84; 155 N. Y. Supp. 916; 3 N. Y. St. Dep. Rep. 888.
14, 33, 74, 77, 84, 92, 93, 99

B

Bargey, Matter of vs. Massaro Macaroni Co., 170 App. Div., 103; 155 N. Y. Supp. 1076 .....22, 45, 88, 93, 96
Barlow vs. Lehigh Valley R. R. Co., 214 N. Y. 116.. 43
Bates, Floyd, Matter of vs. Alonzo Miles, Claim No. 26553, Work. Comp. Com., Feb. 8, 1915 100
Banks, George, deceased, vs. Adams Express Co., St. Industrial Com., Mar. 7, 1916 108
Beck, Christopher, deceased, vs. Nichols & Webster, Claim No. 52857, St. Ind. Com., Nov. 15, 1915..... 94
Bennett, Matter of vs. A. U. Kressell, St. Ind. Com., Jan. 5, 1916 104
Benton, Matter of vs. Fraser, Claim No. 1888, App. Div. Third Dept., Jan., 1916; Aff. 156 N. Y. Supp. 1115
24, 80

PAGE

Berg, Albert, Matter of vs. Great Lakes Dredge & Dock Co., Claim No. 12205, St. Ind. Com., July 16, 1915; reversed —— App. Div. ——; ——N. Y. Supp. —— (May 2, 1916) 78
Berlinger, Matter of vs. Ritchie & Cornell, App. Div. Third Dept., Jan., 1916; 156 N. Y. Supp. 1115 .....24, 85
Bertolami vs. U. N. & C. Co., 198 N. Y. 71 208
Biovanni, Peter, deceased, Matter of vs. New England S. S. Co., Claim No. 52472, St. Ind. Com..... 143
Blatt, Hans Max, deceased, vs. Schoenberger & Noble, File No. 269, The Bulletin, Vol. 1, No. 6, p. 10 108
Bloom vs. Jaffe, 157 N. Y. Supp. 926; 94 Misc. 222.
116, 145
Bloom, Matter of vs. Tillen & Bleek, The Bulletin, Vol. 1, No. 2, p. 12..... 149
Bloomfield, Matter of vs. S. November, Claim No. 74869, aff. App. Div. Third Dept., Mar. 8, 1916; 156 N. Y. Supp. 1116 (without opinion) 84, 122, 131
Bravis vs. C. M. & St. P. R. R. Co., 217 Fed. Rep. 234... 42
Brewster, A. Foster, deceased, Matter of, Claim No. 15410 81
Brio, Francesco P., deceased, Matter of vs. Carpenter, Boxley & Herrick, The Bulletin, Vol. 1, No. 5, p. 11 129
Broderick, Matter of vs. So. Pacific Co., 4 N. Y. St. Dep. Rep. 371 107

PAGE

Broleski, Matter of vs. Nichols Copper Co., Aff. 155 N. Y. Supp. 1096, Claim No. 24887 (without opinion). 188

Brown, Matter of vs. Richmond L. & R. R. Co., The Bulletin, Vol. 1, No. 6, p. 12 104

Buell, Wm. H., deceased, Matter of vs. N. Y. Central R. R. Co., The Bulletin, Vol. 1, No. 5, p. 12..... 170

Buggel, Henry F., Matter of, File No. 2918, St. Ind. Com., Jan. 18, 1916..... 86

Burke, Ed., Matter of vs. Industrial Engineering Co., Claim No. 30288, Work. Comp. Com., Feb. 8, 1915. 117

Burnett vs. Erie R. R. Co., 159 App. Div. 712..... 217

Burns, Matter of vs. So. Pacific Co., 215 N. Y. Memo. 738 77

Burton, George, Matter of vs. Jas. A. Whalen & Sons, Claim No. 45, Aff. 156 N. Y. Supp. 1117 (without opinion) 88

Butler, Matter of vs. Sheffield Farms, The Bulletin, Vol. 1, No. 4, p. 11 109

C

Cahill, Jas. J., deceased vs. Terry & Trench Co., Death File, No. 9, St. Ind. Com., March 27, 1916.... 148

Cantor, Matter of, vs. Rubin Musicant Co., 3 N. Y. St. Dep. Rep. 392..... 96

Cappelli, Matter of, vs. F. R. Cranford, Inc., The Bulletin, Vol. 1, No. 8, p. 11. 107

Carini, Matter of vs. Nickle Plate R. R. Co., 4 N. Y. St. Dep. Rep. 428..... 108

Carita, Ferdinando, Matter of vs. Star Box & Lumber Co., File No. 21001, St. Ind. Com., Dec. 20, 1915. 97

Carroll, Matter of vs. Knickerbocker Ice Co., 169 App. Div. 450; 155 N. Y. Supp. 1 155

PAGE

Chicchetti, Matter of vs. Int. Rapid Transit Co., The Bulletin, Vol. 1, No. 2, p. 10 127

Cino, Matter of vs. Norton Gorman Cont. Co., Aff. 156 N. Y. Supp. 1117, Claim No. 5869 n/c (without opinion).....79, 108

Clark vs. N. Y. Central & Hudson R. R. R. Co., 191 N. Y. 416 209

Clay, Matter of vs. Jas. Thompson Steel Const. Co., Claim No. 40846, Work. Comp. Com., Feb. 24, 1915 104

Clements, Joseph, Matter of, Claim No. 42660..... 81

Cole, Matter of, vs. Calahan & Sperry, 4 N. Y. St. Dep. Rep. 348 .....88, 99

Coleisi vs. Penn. R. R. Co., 208 N. Y. 275..... 210

Colleri vs. Turner, 215 N. Y. Memo. 675 209

Collins, Matter of vs. Brooklyn Union Gas Co., 171 App. Div. 881; 156 N. Y. Supp. 957; reversing 4 N. Y. St. Dep. Rep. 449 105, 188, 185

Connors vs. Semet-Solvay Co., Sup. Ct. Sp. Term, March 22, 1916; —— Misc. ——. 27, 65, 114, 122, 147

Coons, Matter of vs. Kennedy Towing Co., File No. 259, State Ind. Com.....87, 76

Costello, Matter of vs. American Express Co., (Taylor) 217 N. Y. 179.....14, 85

Crockett, Matter of vs. State Insurance Fund, 170 App. Div. 122; 155 N. Y. Supp. 692; Claim No. 48329. 64, 66, 67, 126, 187

Crouse, Levi, Matter of vs. John J. Collins & Sons, Work. Comp. Com., Feb. 5, 1915, Claim No. 26988.... 106

Cunningham, Matter of vs. Buffalo C. & B. Rolling Mills, —— App. Div. ——; 155 N. Y. Supp. 797. 121, 184, 144

D

PAGE

Dailey vs. Stoll, 211 N. Y. 74. 208

Dale, Matter of vs. Saunders Bros., App. Div. Third Dept., March 8, 1916; —— App. Div. ——; 157 N. Y. Supp. 1062; aff. 218 N. Y. 59. 14, 86, 93, 94, 113, 133

Dearborn, Matter of vs. Peugeot Auto Import. Co., St. Ind. Com., Feb. 3, 1916, 170 App. Div. 93; 155 N. Y. Supp. 769.110, 114, 134

Deeny vs. Wright & Cobb Lighterage Co., 36 N. J. Law J. 121..... 36

Del. Lack. & Western R. R. vs. Yurkonis, 238 U. S. 439.. 42

De La Gardelle, Matter of vs. Hampton Co., 167 App. Div. 617; 153 N. Y. Supp. 162.....16, 68, 73, 83, 84, 91

De Phillippis, Matter of vs. Faulkenberg, 170 App. Div. 153; 155 N. Y. Supp. 761 .....105, 137

Di Paolo, Matter of vs. Crimins Contr. Co., St. Ind. Com., Nov. 3, 1915, The Bulletin, Vol. 1, No. 3, p. 7, Aff. App. Div. Third Dept., May 2, 1916, without opinion 10, 79

De Voe, Matter of vs. N. Y. State Railways, 169 App. Div. 472; 155 N. Y. Supp. 12 .....30, 58, 74, 105

Diciaiulo, Matter of vs. Kerbauch, 1 N. Y. St. Dep. Rep. 424 10

Dolici, Matter of vs. Chas. A. Meyer Cont. Co., Claim No. 26818, 156 N. Y. Supp. 1120 88

Downe, Percy R., Matter of vs. Motor Boat Club of Buffalo, Claim No. 11325, St. Ind. Com., Dec. 29, 1915 98

Drury, Matter of vs. Amer. Fruit Prod. Co., 168 App. Div. 509 207

Dunn, Matter of vs. West End Brewing Co., 5 N. Y. St. Dep. Rep. 113..... 107

E

PAGE

Easter, Govan, deceased, Matter of vs. Washington Heights Van Co., Work. Comp. Com., May 3, 1915; Claim No. 34155..... 143

Edwardsen, Matter of vs. Jarvis Lighterage Co., 168 App. Div. 368; 153 N. Y. Supp. 391 .....37, 76

Employers Liability Assurance Corp., In re, (Nichols case), 215 Mass. 497; 102 N. E. 697..... 9

Eldridge, Wm. I., deceased, Matter of vs. Endicott, Johnson & Co., File No. 15061, St. Ind. Com., April 12, 1916..... 101

F

Fagan, Christopher, Matter of vs. United Traction Co., Claim No. 36456, St. Ind. Com., Feb. 23, 1916..... 117

Fairchild, Matter of vs. Penn. R. R. Co., 170 App. Div. 135; 155 N. Y. Supp. 751. 118, 169

Farrar, Vincent, Matter of vs. Gristede Bros., Claim No. 24089, St. Ind. Com., Jan. 19, 1916 86

Feinman, Matter of vs. Albert Mfg. Co., 170 App. Div. 147; 155 N. Y. Supp. 909 121

Fennelly, Patrick, Matter of vs. Burden Iron Co., File No. 14876; Work. Comp. Com. 100

Fenton vs. Thorley, 5 W. C. C. 1 8

Fiocca, Matter of vs. Dillon, Claim No. 23927, St. Ind. Com., Feb. 10, 1916, The Bulletin, Vol. 1, No. 6, p. 13 85

Fitzgibbons, Michael, deceased, Matter of vs. Clarence S. Woodward, St. Ind. Com., Nov. 24, 1915..... 87

Fogarty, Wm., deceased, Matter of vs. National Biscuit Co., Claim No. 350, St. Ind. Com., Feb. 3, 1916; The Bulletin, Vol. 1, No. 6, p. 9..... 87

PAGE

Foley, Matter of vs. Bretton Hall Co., Claim No. 57177; Aff. 156 N. Y. Supp. 1122 87
Foley, Matter of vs. Peter F. Doran, Work. Comp. Com., March 29, 1915; Claim No. 57508..... 91
Fortino, Matter of vs. Merchant's Desp. Trans. Co., —— App. Div. ——; 156 N. Y. Supp. 262..... 120
Fresusk vs. Pittsburgh Cont. Co., 159 App. Div. 856.. 207
Friedenberg, Matter of vs. Empire United Railways Co., 168 App. Div. 618; 154 N. Y. Supp. 851..118, 122
Friscia, Matter of vs. Drake Bros., 167 App. Div. 496; 158 N. Y. Supp. 892. 11, 29, 128

G

Gamba, Matter of vs. N. Y. Post. Grad. School & Hospital, Work. Comp. Com., March 29, 1915..... 98
Gallenkamp vs. Garvin Mach. Co., 179 N. Y. 588..... 55
Gardner, Matter of vs. Horsehead's Const. Co., 171 App. Div. 66; 156 N. Y. Supp. 899 .....85, 95, 184
Gimber, Matter of vs. T. P. Kane Co., Claim No. 25199, 2 N. Y. St. Dep. Rep. 475; aff. 155 N. Y. Supp. 1109 .....16, 98
Gleisner, Matter of vs. Gross & Herbener, 170 App. Div. 87; 155 N. Y. Supp. 946.....6, 20, 88, 93, 96, 188
Godder, J. Irving, Matter of, vs. Hartt, et. al., St. Ind. Com., Feb. 9, 1916..... 92
Goetz vs. Duffy, 215 N. Y. 58 55
Goldstein, Matter of vs. Center Iron Works, 167 App. Div. 526; 158 N. Y. Supp. 224 .....5, 188
Gould's case, 215 Mass. 480.. 86
Grady, Matter of vs. Holliday, 155 N. Y. Supp. 1110..18, 81
Grammici, Matter of vs. Simon Zimm, Aff. App. Div. Third Dept., March 8, 1916; —— N. Y. Supp. ——, (without opinion).. 121

PAGE

Gray, Matter of vs. Dejong, Aff. App. Div. Third Dept., March 8, 1916; (without opinion), Claim No. 72766 181
Great Northern R. R. Co., vs. Whitehead, 4 B. W. C. C. 89 46
Green, Fred. H., Matter of vs. Miller & Miller, File No. 17810, State Ind. Com., Jan. 31, 1916..... 97
Griffiths, Jos., Matter of vs. American Bitumastie Enamels Co., St. Ind. Com., April 4, 1916..... 97

H

Herkey, Matter of vs. Agar Mfg. Co. 90 Misc. 457; 158 N. Y. Supp. 869.....47, 148
Harnett, Matter of vs. Thos. J. Steen Co., 2 N. Y. St. Dep. Rep. 492; Aff. without opinion, 158 N. Y. Supp. 1119; Appeal dismissed 216 N. Y. 101. 9, 100, 101, 137
Harrison, Matter of vs. Kane, Claim No. 27411; Aff. 158 N. Y. 1119 (without opinion) 103
Heitz, Matter of vs. Ruppert, Aff. 155 N. Y. Supp. 1112; —— N. Y. ——, (Court of Appeals, May 2, 1916). 100, 102, 107
Hendricks, Matter of vs. Seaman Bros., 170 App. Div. 188; 155 N. Y. Supp. 688. 86, 102
Henry, Matter of vs. G. Levor & Co., Claim No. 65555, St. Ind. Com.....88, 99
Hiland, Jas. J., deceased, Matter of vs. D. Winant, Inc., The Bulletin, Vol. 1, No. 2, pp. 9, 10..... 185
Hillary, John T. vs. Kaufman Bros., Claim No. 56488, St. Ind. Com., Jan. 8, 1916.. 91
Hinman, Matter of, 147 App. Div. 452; 206 N. Y. 653.. 127
Holland Laundry vs. Travelers Ins. Co., 166 App. Div. 621 55

PAGE

Homeopathic Hospital of Albany vs. Chalmers, 157 N. Y. Supp. 1000..... 116
Horan, Chas., deceased, Matter of vs. Tidewater Transp. Co., Claim No. 28745, Work. Comp. Com., April 30, 1915..... 76
Hotaling, Matter of vs. Standard Oil Co., The Bulletin, Vol. 1, No. 1, p. 12.. 105
Hubbell vs. Pioneer Paper Co., 160 App. Div. 856..... 210
Hurle, In re, 217 Mass. 223; 104 N. E. 336..... 33
Hurley vs. Alcott, 198 N. Y. 132 208

I

Ignatowsky, Matter of vs. Berman, The Bulletin, Vol. 1, No. 3, p. 9..... 112
Illinois Central R. R. vs. Behrens, 233 U. S. 473.... 42
Ives vs. So. Buffalo Railway Co., 201 N. Y. 271..... 4

J

Jackson vs. Green, 201 N. Y. 76 208
Jackson vs. C. M. & St. Paul R. R., 210 Fed. Rep. 495. 42
James, Matter of vs. Wetherbee, Sherman Co., 2 N. Y. St. Dep. Rep. 483..... 96
Jennings, Matter of vs. State of New York, St. Ind. Com., Sept. 20, 1915..... 98
Jensen, Matter of vs. So. Pacific Co., 215 N. Y. 514. 4, 27, 37, 39, 73, 75, 77, 168, 170
Johnson, In re, 217 Mass. 378; 104 N. E. 735..... 33

K

Kansas City West R. R. Co. vs. McAdow, 164 S. W. 188; Aff. U. S. Sup. Ct., Jan. 3, 1916, 240 U. S. 51 43
Keffer, Albert, Matter of vs. Yonkers Auto Repair Co., Claim No. 37170; State Industrial Commission 92

PAGE

Kennedy, Matter of vs. Kennedy Mfg. & Eng. Co., Claim No. 72533, St. Ind. Com., Jan. 8, 1916; The Bulletin, Vol. 1, No. 5, p. 12 31
Kenny, Matter of vs. Union Railway Co., 166 App. Div. 497; 152 N. Y. Supp. 117 .....95, 138
Kennerson vs. Thames Towboat Co., 94 Atl. Rep. (Conn.) 372 36
Kenz vs. Bernheimer & Schwartz Pilsner Brewing Co., 162 App. Div. 777 207
Kiegher, Matter of vs. General Electric Co., —— App. Div. ——; —— N. Y. Supp. ——; (May 2, 1916) 115
Kiernan, Matter of vs. Freidstadt Underpinning Co., Claim No. 225 n. c., App. Div. Third Dept., March 8, 1916; 157 N. Y. Supp. 900. 79, 103, 112
Kilberg, Matter of vs. V. S. Vitsch, 171 App. Div. 89; 156 N. Y. Supp. 971..118, 129
King vs. The Viscolloid Co., 219 Mass. 420; 106 N. E. 988 32
Kingsley, Matter of vs. Donovan, 169 App. Div. 828; 155 N. Y. Supp. 801..... 102
Klinger, Geo., Jr., vs. J. Odell Whitenack, Claim No. 50467, St. Ind. Com., July 26, 1915..... 129
Koaster vs. Rochester Candy Co., 194 N. Y. 92..... 55
Kohler, Matter of vs. Frohman, 167 App. Div. 533; 153 N. Y. Supp. 559.17, 83, 135
Kolb, Matter of vs. Borden Cond. Milk Co., 4 N. Y. St. Dep. Rep. 347; Claim No. 32853; Aff. App. Div., Third Dept., May 2, 1916 129
Kossoff, Matter of vs. R. H. Macy & Co., St. Ind. Com., Feb. 10, 1916..... 122
Kratz, Mathias vs. Sup. Chemical Co., Claim No. 24411, St. Ind. Com., March 6, 1916 100

PAGE

Kreppell, Matter of vs. Boyland, 2 N. Y. St. Dep. Rep. 489 128

L

Lamont Prentiss vs. N. Y. State Railway Co., Claim No. 29483; St. Ind. Com., Nov. 15, 1915..... 116

La Fleur, Henry, deceased, Matter of vs. Geo. M. Wood, Jr., St. Ind. Com., March 14, 1916..... 108

Larsen, Matter of vs. Paine Drug Co., 169 App. Div. 838; 155 N. Y. Supp. 759; Aff. —— N. Y. ——, May 12, 1916 .....18, 82, 185

Lazerick, Matter of vs. N. Y., N. H. & H. R. R. R. Co., Claim No. 29452; Aff. 155 N. Y. Supp. 1119 (without opinion) 102

Lederer, Rose, Matter of vs. Deutsch Bros., Claim No. 21882, St. Ind. Com., Feb. 14, 1916 106

Lepidus, Sam'l, Matter of vs. Empire City Lumber Co., Claim No. 3181, St. Ind. Com., Jan. 26, 1916..... 92

Leslie, Hugh, deceased, vs. O'Connor & Richman, File No. 70582, St. Ind. Com., July 28, 1915; Aff. App. Div. Third Dept., May 2, 1916 (without opinion).. 104

Lester vs. Otis Elevator Co., 169 App. Div. 618; 153 N. Y. Supp. 1058.....46, 142

Linck, Matter of vs. Millard, 4 N. Y. St. Dep. Rep, 385 99

Lipstein vs. Provident Loan Society, 154 App. Div. 732 207

Lloyd vs. Power Spec. Co., File No. 291, The Bulletin, Vol. 1, No. 6, p. 9.....34, 95

Logerto vs. Central Bldg. Co., 198 N. Y. 390..... 208

Ludwig, Matter of vs. M. Groh's Sons, State Ind. Com., March 4, 1916..... 106

PAGE

Lottawanna The, 21 Wall 558 38

Lyon, Matter of vs. Windsor & Davis, App. Div. Third Dept. May Term 1916; —— App. Div. ——; —— N. Y. Supp. ——..25, 85

M

Manning vs. Int. Marine Co., 212 Fed. Rep. 933..... 37

Marinaccio, Matter of vs. Flinn- O'Rourke Co., File No. 5465, St. Ind. Com.; —— App. Div. ——; —— N. Y. Supp. ——, (May 2, 1916)..... 131

Marino vs. Lehmier, 173 N. Y. 530 55

Marley, Thomas, Matter of vs. Otis Elevator Co., Claim No. 43636, St. Ind. Com., March 27, 1916..... 125

Martucci, Matter of vs. Hill Bros. Co., Claim No. 70685, 171 App. Div. 370; 156 N. Y. Supp. 833..... 87

Mason-Henry Press vs. Aetna Life Ins. Co., 211 N. Y. 489 55

Mazzarizi, Matter of vs. Ward & Tully, Claim No. 70995, 170 App. Div. 868; 156 N. Y. Supp. 964.....78, 108

McCaffrey, Matter of vs. Tager Cont. Co., The Bulletin, Vol. 1, No. 2, p. 11 149

McCaffrey, Matter of vs. Turnbull, The Bulletin, Vol. 1, No. 6, p. 21..... 149

McComsey, Fred, Matter of vs. Geo. E. Simmons, Claim No. 14407, The Bulletin, Vol. 1, No. 6, p. 13..23, 96, 98

McDonald vs. Mallory, 77 N. Y. 546 37

McGraff, Jas. J., deceased, vs. Robt. Tapper, Claim No. 24213, Workmen's Compensation Commission.... 76

McMahon, Matter of vs. Interborough Rapid Transit Co., 5 N. Y. St. Dep. Rep. 109 .....33, 99

McMurray, Matter of vs. J. J. Little & Ives Co., 3 N. Y. St. Dep. Rep. 395....33, 107

PAGE

McNeill, Thos. J., deceased, vs. F. Holman & Sons, Inc., St. Ind. Com., March 7, 1916; The Bulletin, Vol. 1, No. 6, p. 4..... 127

McQueeney, Matter of vs. Sutphen & Meyer, 167 App. Div. 528; 153 N. Y. Supp. 554..52, 69, 80, 135, 146

Miallo, Matter of vs. City of Watertown, Board of Waterworks, Work. Comp. Com., March 29, 1915.... 98

Mihn, Matter of vs. Hussey, 169 App. Div. 742; 155 N. Y. Supp. 860..14, 82, 83, 97

Miller, Chas. R., deceased, vs. American Express Co., St. Ind. Com., Jan. 26, 1916 104

Miller vs. New York Railways Co., 171 App. Div. 316; 157 N. Y. Supp. 200..... 144

Miller vs. No. Hudson Cont. Co., 166 App. Div. 348.. 16

Mills, Chas. V., deceased, Matter of vs. L. B. Locke & Potts, File No. 449, St. Ind. Com., July 12, 1915.. 91

Miner, Matter of vs. Turnbull, The Bulletin, Vol. 1, No. 6, p. 21..... 149

Mochler, Matter of vs. Hawkes, Award reversed, App. Div. Third Dept., May 2, 1916, opinion by Howard, J.; —— App. Div. ——; —— N. Y. Supp. ——. 120

Mohr, Frank, deceased, Matof vs. Fredk. L. Cranford, Inc., The Bulletin, Vol. 1, No. 6, p. 10..... 109

Mooney, Matter of vs. Weber Piano Co., 156 N. Y. Supp. 1135 99

Moore, Matter of vs. Lehigh Valley R. R. Co., 2 N. Y. St. Dep. Rep. 472; 169 App. Div. 177; 154 N. Y. Supp. 620 .....102, 169

Moore, Matter of vs. Wm. Harkins Co., 4 N. Y. St. Dep. Rep. 383..... 107

PAGE

Morrisey, Matter of vs. N. Y. Railways Co., Claim No. 35284, Aff. 154 N. Y. Supp. 1134 .....102, 110

Morey, Matter of vs. Worden, 2 N. Y. St. Dep. Rep. 494 124

Myerhof, Walter E. vs. Myerhof Bros., Claim No. 63985, St. Ind. Com., Oct. 20, 1915 94

Myers, Adam, Matter of vs. Ed. J. Smith, Claim No. 6222, Work. Comp. Com., March 29, 1915..... 106

N

Newman, Matter of vs. Newman, 169 App. Div. 745; 155 N. Y. Supp. 665. 14, 17, 20, 21, 83, 86, 93, 96, 106, 137

N. Y. C. & Hud. River R. R. vs. Carr, 238 U. S. 260.. 42

Nicholson, Matter of vs. Klipstein & Co., File No. 419, Aff., App. Div. Third Dept., Nov., 1915; 155 N. Y. Supp. 1127; (without opinion) 24, 82, 102

Nolan, Matter of vs. Cranford Co., Claim No. 54558, 4 N. Y. St. Dep. Rep. 337; Aff. 155 N. Y. Supp. 1128 (without opinion) 93

Noonan, Edgar J., vs. Yellow Taxicab Service, Claim No. 14485, St. Ind. Com., March 13, 1916..... 109

Norfolk & West. R. R. vs. Earnest, 229 U. S. 114.. 41

Norman, Matter of vs. Empire Lighterage Co., 2 N. Y. St. Dep. Rep. 480..... 96

No. Carolina R. R. vs. Zachary, 232 U. S. 248..... 41

No. Pacific Railway Co. vs. Mary A. Meese, 239 U. S. 614; 206 Fed. 222; 211 Fed. 254 47

Norton, Jas. vs. International Cork Co., Claim No. 54641, St. Ind. Com., Sept. 22, 1915 118

O

PAGE

Oberg, Axel, Matter of vs. W. J. McRoberts & Co., St. Ind. Com., Dec. 20, 1915, (on appeal)..... 78
O'Connell, Matter of vs. Modern Machine Tool Co., St. Ind. Com., Feb. 26, 1916. 122
O'Connor, Tillie, Matter of vs. Harper & Bros., Claim No. 9028, St. Ind. Com., Dec. 22, 1915..... 104
Okrzsezs, Matter of vs. Lehigh Valley R. R. Co., 170 App. Div. 15; 155 N. Y. Supp. 919 169
Olsen, Julius, deceased, Matter of vs. State Insurance Fund, Work. Comp. Com., April 27, 1915..... 96
Omaha & Council Bluffs vs. Int. St. Commerce Com., 230 U. S. 324..... 48
O'Neil, Matter of vs. Carley Heater Co., Claim No. 12421, The Bulletin, Vol. 1, No. 1, p. 11; Aff. March 8, 1916, App. Div. Third Dept. without opinion; (—— N .Y. Supp. ——). 102
O'Neil, Matter of vs. West Side Storage Warehouse, (decided with Feinman) 170 App. Div. 147; 155 N. Y. Supp. 909..... 121
O'Neill, Chas. vs. Booth Theatre, Claim No. 50284, St. Ind. Com., Nov. 29, 1915.. 91

P

Parsons, Matter of vs. Del. & Hudson R. R. R. Co., 167 App. Div. 536; 153 N. Y. Supp. 179 .....42, 169
Partridge, Matter of vs. Norwich Pharmacal Co., The Bulletin, Vol. 1, No. 3, p. 10 .....108, 169
Paulsen, Matter of vs. Schulbohn, 5 N. Y. St. Dep. Rep. 112 82
Pederson vs. Del. Lack. & West. R. R., 229 U. S. 146 41
Peers, Matter of vs. De Carion & Co., The Bulletin, Vol. 1, No. 2, p. 10..... 105
Pensabene vs. Auditore Co., 78 Misc. 538 36
Petrie, Matter of vs. Oneida Steel Pulley Co., 165 App. Div. 561; 151 N. Y. Supp. 307; Aff. 215 N. Y. 335. 120, 137
Plass, Matter of vs. Central R. R. of New Eng., 4 N. Y. St. Dep. Rep. 351; 169 App. Div. 826; 155 N. Y. Supp. 854 .....33, 99
Pogue, Matter of vs. Nassau Light & Power Co., 1 N. Y. St. Dep. Rep. 429.... 105
Post, Matter of vs. Burger & Gohlke, 168 App. Div. 403; 153 N. Y. Supp. 505; 216 N. Y. 544. 34, 64, 65, 68, 94, 112, 146, 147
Powley, Matter of vs. Vivian & Co., 169 App. Div. 170; 154 N. Y. Supp. 426....44, 95
Pranio, Matter of vs. Peloso, Claim No. 5539, Aff. 155 N. Y. Supp. 1135..... 80
Pritz, Matter of vs. Baumont, Claim No. 39670; 154 N. Y. Supp. 1140 (without opinion) 35, 95
Prentiss, Lamont vs. N. Y. State Railway Co., Claim No. 29483, St. Ind. Com., Nov. 15, 1915..... 116

R

Rachlin, Ike vs. Danziger Paint Co., St. Ind. Com., June 30, 1915, Claim No. 54764 101
Ramsey, Matter of vs. Fairbanks, Morse & Co., Claim No. 6522, 155 N. Y. Supp. 1136 (no opinion).11, 128, 133
Rheinwald, Matter of vs. Builders Brick & Supply Co., 1 N. Y. St. Dep. Rep. 417; 168 App. Div. 425; 153 N. Y. Supp. 598. 6, 44, 95, 137
Rhyner, Matter of vs. Huber Bldg. Co., 171 App. Div. 71; 156 N. Y. Supp. 903. 6, 11, 117, 128, 134
Rist, Matter of vs. Larkin & Sangster, 171 App. Div. 108; 156 N. Y. Supp. 875. 33, 107

PAGE

Rockwell, Matter of vs. Lewis, 168 App. Div. 674; 154 N. Y. Supp. 898..... 121
Rodgers, Frank J., Matter of vs. Oceanic S. S. Nav. Co., St. Ind. Com., Jan. 26, 1916 78
Rodzborski vs. American Sugar Refining Co., 210 N. Y. 262..... 208
Rounsaville vs. Central R. R. Co., 94 Atl. Rep. 892..36, 40

S

St. Louis S. F. & T. R. R. R. vs. Seale, 229 U. S. 156 41
Sala, Matter of vs. Martarella & Giannessi, File No. 7165, The Bulletin, Vol. 1, No. 6, p. 11..... 78
Sauter, George, Matter of vs. N. Y. Central R. R. Co., St. Ind. Com., Oct. 20, 1915 75
Schwab, Matter of vs. Emporium Forestry Co., 167 App. Div. 614; 153 N. Y. Supp. 234; Aff. 216 N. Y. Memo. 712 119
Schwitzer vs. Hamburg-American Line, 149 App. Div. 900; s. c. 78 Misc. 448.. 36
Scott, Matter of vs. Salvation Army, Work. Comp. Com., April 30, 1915..... 98
Second Employers Liability Cases, 223 U. S. 1....41, 217
Secor, Mary, Matter of vs. Jas. A. Cullin, Jr., Claim No. 31770, St. Ind. Com., July 26, 1915 76
Shanahan vs. Monarch Eng. Co., 156 N. Y. Supp. 143. 28, 114, 128
Shanks vs. Del., Lack. & West. R. R. Co., (Jan., 1916), 36 Sup. Ct. Rep. 188; (214 N. Y. 413)..41, 75
Shinnick vs. Clover Farms Co., 169 App. Div. 236; 154 N. Y. Supp. 423; s. c. 152 N. Y. Supp. 649. 26, 62, 114, 122
Sickles, Matter of vs. Ballston Refrig. Co., 171 App. Div. 123; 156 N. Y. Supp. 864. 13, 83, 93
Sieplenska, Matter of vs. N. Y. C. R. R. Co., 4 N. Y. St. Dep. Rep. 895..... 103
Skozylois, Stanislaw, deceased, vs. Phillip Vinocour, The Bulletin, Vol. 1, No. 6, p. 14 149
Sloat, Warren, deceased, vs. Rochester Taxicab Co., File No. 14084, St. Ind. Com., May 12, 1916..... 109
Smart, Wm. H. vs. Cruss, Kemper Co., Claim No. 67003, St. Ind. Com..... 101
Smith vs. Industrial Acc. Com. 147 Pac. Rep. 600..... 40
Smith, Matter of vs. Price, 1 N. Y. St. Dep. Rep. 421; 168 App. Div. 421; 153 N. Y. Supp. 221 .....86, 137
Smith Dock Co. vs. Readhead, 5 B. W. C. C. 449..... 47
Solle, Matter of vs. N. Y., N. H. & H. R. R. Co., 4 N. Y. St. Dep. Rep. 492.. 103
Sorensen, Matter of vs. Southern Pacific Co. 76
Sorge, Matter of vs. Alderbrun Co., 3 N. Y. St. Dep. Rep. 390, Aff. —— N. Y. ——; (Court of Appeals, May 2, 1916, no opinion) 103
Stadmuller, Matter of vs. George Ehret, The Bulletin, Vol. 1, No. 4, p. 9.. 155
Staley vs. Ill. Central R. R. Co., 109 N. E. 342..... 40
Stanley, Matter of vs. Wood & Dolson Co., The Bulletin, Vol. 1, No. 4, p. 10 108
State ex rel Jarvis vs. Daggett, 151 Pac. Rep. 648..... 38
Stein, Louis, Matter of vs. John Wegman, File No. 6543, St. Ind. Com..... 104
Sterling, Matter of vs. Western Union Tel. Co., The Bulletin, Vol. 1, No. 3, p. 10 87
Sullivan, John L., Matter of vs. Church E. Gates & Co., Claim No. 460, Work. Comp. Com., Dec. 8, 1914 110

PAGE

Sullivan, Michael, deceased, vs. Industrial Engineering Co., Claim No. 671; Aff. —— App. Div. ——; —— N. Y. Supp. ——, (May 2, 1916)..... 108
Surfass, John H. vs. American LaFrance Fire Engine Co., Claim No. 55428.... 100

T

Thomas vs. B. & M. R. R. Co., 218 Fed. Rep. 148.. 42
Thompson vs. N. E. M. Co., 5 W. C. C. 71..... 46
Tirre, August, deceased, Matter of vs. Bush Terminal Co., File No. 575; reversed —— App. Div. ——; ——N. Y. Supp. ——, (May 2, 1916). 76, 126, 129
Tomassi, Matter of vs. Christensen, 171 App. Div. 284; 156 N. Y. Supp. 905. 58, 68, 73, 77, 82, 91, 136
Tracy, Wm. H. J., vs. De Laval Separator Co., Claim No. 13788, St. Ind. Com., Jan. 18, 1916..... 101
Tremberger, Chas., deceased, Death File No. 894..... 110
Trim Joint Dist. School vs. Kelley, 7 B. W. C. C. 274 9
Turoff, Sol., vs. Archer Detective Agency, Claim No. 8567, St. Ind. Com..... 94

U

Ulrich, Matter of vs. Lenox Coat, Apron & Supply Co., 155 N. Y. Supp. 1145 99
Underwood, Matter of vs. Int. Elevating Co., Claim No. 47205; Workmen's Compensation Commission..37, 76
U. S. vs. Balt. & Ohio S. W. R. R. Co., 226 U. S. 14 43
U. S. Fid. & Guaranty Co. vs. N. Y. Railways Co., Sup. Ct. App. Term, Jan., 1916; 156 N. Y. Supp. 615....46, 143
U. S. Mutual Accident Assn. vs. Barry, 131 U. S. 100. 9

V

PAGE

Valentine, Matter of vs. Smith, Angevine Co., 2 N. Y. St. Dep. Rep. 461; 168 App. Div. 403; 153 N. Y. Supp. 505; Aff. 216 N. Y. 544..34, 94

W

Wagner, John H., Matter of, Claim No. 6280..... 81
Waite, Matter of vs. Penn. R. R. Co., Claim No. 12685, 156 N. Y. Supp. 1149, (without opinion).. 169
Walker vs. Clyde S. S. Co., Matter of, 215 N. Y. 529. 38, 77, 168
Walker, Matter of vs. M. Mossom Co., 3 N. Y. St. Dep. Rep. 362 86
Walz, Matter of vs. Holbrook, Cabot & Rollins Corp., 170 App. Div. 6; 155 N. Y. Supp. 708.....11, 128
Waters, Matter of vs. W. J. Taylor Co., 154 N. Y. Supp. 1149, (no opinion); Aff. —— N. Y. ——, May 12, 1916 103
Watters, George vs. Francis E. Fitch Co., Claim No. 71773, St. Ind. Com., Sept. 27, 1915 100
White, Matter of vs. N. Y. Central R. R. Co., Claim No. 31018, 2 N. Y. St. Dep. Rep. 477; Aff. 216 N. Y. Memo 653.....74, 169
White, Jas. vs. Cruss, Kemper Co., Claim No. 14847, St. Ind. Com., Jan. 19, 1916 106
Wigmore, Dan'l J., deceased, vs. City of New York, Dept. of Docks & Ferries, Work. Comp. Com., Feb. 8, 1915 98
Wiley vs. Solvay Process Co., 215 N. Y. 584.....207
Williams, Matter of vs. Electric Carbon Co., 4 N. Y. St. Dep. Rep. 439..... 130
Williams, Thos., Matter of vs. Messerau Metal Bed Co., Claim No. 38318, Work. Comp. Com., May 12, 1915 97

PAGE

Wilson, Matter of vs. Dorflinger, 170 App. Div. 119; 155 N. Y. Supp. 857; Reversed 218 N. Y. 84 (Ct. of Appeals, April 25, 1916) 18, 74, 86

Winfield, Matter of vs. N. Y. Central R. R. Co., 168 App. Div. 351; 153 N. Y. Supp. 499; 216 N. Y. 284. 40, 52, 74, 169

Winters, Matter of vs. N. Y. Herald Co., Claim No. 4475, Aff. 155 N. Y. Supp. 1149 (without opinion) 108

Winters vs. Peter Doelger Brewing Co., —— Misc. ——; —— N. Y. Supp. ——, (Sup. Ct., App. Term, May, 1916)..... 148

Woodcock, Matter of vs. Walker, 170 App. Div. 4; 155 N. Y. Supp. 702..... 127

PAGE

Woodward, Matter of vs. E. W. Conklin & Sons, Inc., App. Div. Third Dept., March 8, 1916, (opinion by Cochrane and Woodward, JJ.) 157 N. Y. Supp. 948; —— App. Div. ——. 47, 142, 145

Workman vs. New York City, 179 U. S. 552..... 88

Y

Yume, Matter of vs. Knickerbocker Portland Cement Co., Claim No. 15210, 3 N. Y. St. Dep. Rep. 353; Aff. without opinion, 153 N. Y. Supp. 1151; App. diss. 216 N. Y. Memo. 653.....9, 100, 101

Z

Ziegler, Matter of vs. P. Cassidy's Sons, Claim No. 58081, Aff. 155 N. Y. Supp. 1151, (without opinion).. 127

GENERAL INDEX

GENERAL INDEX

A

[REFERENCES ARE TO PAGES]

Abandoned instrumentalities of interstate commerce..... 42
Accident, see Accidental Injuries.....
Accident, defined 8, 9
Accident, notice to employer of..... 180
Accidental injuries, defined..... 8, 9
Accidental injuries, alone compensated..... 82
Accidental injuries, what are..... 8, 9
See also "Diseases resulting from Accidental Injuries"
anthrax 88, 99
assault 9, 100, 107
diseases resulting from..... 107
exhaustion from overwork..... 88
drowning 76, 102
freezing 88, 99
gangrene 104
heat prostration from boiler..... 100
hernia 99
heart disease 107
infection from germ, through skin.....88, 99
insanity, when 88, 99
lightning 100
nervous shock 88, 99
poison ivy 88, 99
poisonous fumes 100
pneumonia following operation, death from..... 107
pulmonary tuberculosis from falling into water.....82, 88, 107
risk, in line of humanity..... 108
rupture 99
strain 99
tetanus, causing death..... 107
Accidental injuries, what are not.....82, 88
See "Occupational Diseases"
ankylosis of joint..... 101
anthrax 101
beat hand 101
blood poisoning 100
injury from dust..... 100
lead poisoning 88, 101
loss of vision..... 100
self-inflicted injuries..... 112
Accidents, report of.....180, 167
Action against third persons for negligence.....45, 141
See "Negligence of third party causing injury"
Action for death 218, 219

[REFERENCES ARE TO PAGES]

Action for penalty 189
Action to recover award..... 140
Adjustment of claims..... 181
Adjustment of premiums in State Fund..... 161
Administration of State Fund..... 65
Admiralty jurisdiction..... 86
optional remedies 87, 77
Adopted child 110
Advance payments 184
Aggravation of disease by accident..... 108
Agreements in settlement of compensation..... 182
Agreement to pay cost of compensation insurance..... 144
Agreements to be approved..... 182
Agreements setting aside..... 182
Aliens, amount of compensation.....129, 180
Alterations 110
Alternative remedy 118
Amendments of 1916 as to liability..... 114
Amount of compensation for death.....11, 125
Amputation of ear..... 26
Animal, attack by..... 26
Annotations, (commencing) 73
Annotations of definitions.....91-111
Annotations of groups.....74-89
Anthrax, accidental injury.....83, 99
Anthrax, not accidental injury..... 101
Apoplexy 109
Appeals 6, 186, 187, 188
limited to question of law.....182, 188
construction of statute, upon..... 187
to Court of Appeals, when taken.....186, 187
consideration of English decisions..... 187
employer in State Fund cannot appeal.....66, 187
rules for 188
exceptions not necessary..... 188
examination of evidence upon..... 188
reversal to permit examination of claimant..... 188
reversal for further evidence..... 188
award on consent affirmed..... 184
reversal for lack of evidence..... 184
arbitrary, unfair and unreasonable decisions..... 184
decision in conflict with facts..... 184
Appeal, evidence examined on..... 188
Appellate Division, Third Dept., appeals to..... 186
rules for appeals..... 188
Application of compensation law 12, 73
Application of law to industries, rule for.....68, 73
Application of statute 73
rule for 73
benefits limited 73, 91
Arbitrary decision reversed..... 184
Arbitration Committee 182
Arbitration Committee, powers of..... 182
Arbitration, procedure for 182
Architects 18
Arising out of and in the course of the employment.....8, 101
Accident must both arise out of and in the course of..... 8
"arising out of," defined..... 9

[REFERENCES ARE TO PAGES]

Arising out of and in the course of the employment (continued).
"in the course of," defined..... 10
time of beginning or stopping work, not controlling..... 10
entering or leaving the premises.....10, 79, 103
going and returning from work.....10, 79
foreman assaulted by fellow employees..... 101
employee assaulted by fellow employees.....101, 106
riding home in employer's conveyance..... 10
scuffle over horses..... 101
taking short cut..... 104
seeking shelter from rain..... 102
cleaning motor cycle..... 102
eating lunch on premises.....104, 106
protecting wagon 102
interruptions in employment..... 10
drowning 102
leaving work to get drink of water..... 103
reporting early for work..... 102
leaving work to relieve nature..... 103
leaving subway 79
taking poison by mistake..... 102
leaving work to eat meals..... 103
falling on stairs 102, 104
falling on floor 103
falling on landing 78
falling from building 103
scope of employment..... 10
helping employee of another contractor..... 103
assault by Union man..... 104
claim agent injured on train..... 104
disobedience of rules..... 112
struck by automobile..... 104
cut by glass while making delivery..... 105
emergencies, acts during..... 103
having watch tested..... 105
injury in toilet..... 105
mailing letter after work..... 105
walking on railroad track..... 105
watchman injured on track..... 74
catching ride 105
fall caused by disease..... 105
street risks 106
frolicking, accidents caused by.....105, 107
injury to traveling salesmen.....24, 25
Artificial limb, fracture of..... 106
Assault, as accidental injury.....9, 100
arising out of the employment..... 104
not arising out of the employment..... 106
by Union man..... 104
Assessments against employers in State Fund.....60, 61, 165
Assessments after withdrawal from State Fund..... 165
Assignment of compensation prohibited..... 144
Association for accident preventions..... 162
Assumption of risk.....208, 209
abolished as defense, when..... 113
question of fact.....209, 210
in action at common law..... 209
Attacks, see Assaults.....

[REFERENCES ARE TO PAGES]

Attending call of nature....79, 103
Attorney, appearance before commission.... 153
Attorneys' fees, subject to approval.... 138
Audit of payrolls.... 165
Award, how made....5, 152
Award, may be made on hearsay evidence.... 155
Award, appeal from.... 136
Award final when 5, 152
Award review of 6, 136
Award, modification of 136
Award, copy to be served.... 152
Award of compensation bars suit against third party.... 144
Award on consent affirmed.... 134
Award of industrial Commission.... 152

B

Basis for computing compensation....11, 116
Bastard children as dependents.... 110
Beat hand, not accidental.... 101
Benefits of statute limited....78, 91
Benefits, death 125, 131
See "Death Benefits"
Beveling glass 80
Bicycle, used in work.... 102
Blood poisoning, when not accidental....100, 108
Board and lodging, included in wages.... 110
Boat club 98
Brakeman shifting cars.... 42
Burial expenses 11, 125
Burns, injury from.... 103
Buyer for wholesaler, not covered.... 91
Buying and selling fruit.... 83

C

Cancellation of insurance contract....148, 149
Cancer 108
Captain assisting in unloading vessel.... 76
Car shops 75
Caring for horse.... 86
Carpenters, employed casually....22, 88
Casual employees 22, 88, 96
Casual employments 22
Catching ride 105
Charitable institutions, exempted.... 19
Chauffeurs 19
Chauffeurs, private, exempted.... 19
Child, defined 110
Children, under 18 ....11, 126
Children, illegitimate 110
Churches 19
Claim for compensation, when made....131, 141
Claims for compensation, how settled.... 132
Claims, determination of.... 131
See "Determination of Claims"

[REFERENCES ARE TO PAGES]

Claimant may be cross-examined 183
Classifications of industries 78-90, 195-201
Classifications of risks of State Fund 161
Cleaning glasses, confectionery store 81
Clerical help 29
Clerk unloading vehicle 86
Clerk working in interstate commerce 41
Clothing, mfg. of 84
  model employed in 84
  salesman employed in 84, 85
  piece workers at home 85
Clothing, boys and girls 85
Clubs 19
Colleges 19
Collection of premiums in State Fund 165
Commission (see "Industrial Commission")
Commissioner, Deputy, power of 154
Committee of Arbitration 182
Common law defenses, abolished 118
Common law remedies, superseded 118
Common law wife 127
Comparison of State Fund with stock and mutual companies 57
  (See Part II, Sec. 27-30) 54, 62
Compensatable injuries, defined 12
"Compensation" defined 99
Compensation, how payable 189
Compensation to aliens, amount of 180
Compensation for death, amount of 11, 125
Compensation for death, to whom paid 125
Compensation for death 125-131
  See "Death Benefits"
Compensation for deficiency 141
Compensation for disability, amount of 11, 118
Compensation for disfigurement 123
Compensation, who entitled to 11, 125
Compensation, basis of 116
Compensation claims, how settled 182
Compensation insurance 51
  under subdivision 3 54
  compulsory 111
  method optional 52
Compensation, agreement to pay 182
Compensation legislation, history of 4
Compensation schedules 118
  See "Schedules of Compensation"
Compensation liability 111
Compensation liability exclusive 5, 118
Compensation, liability for 111, 112
Compensation lien, priority of 145
Compensation, limitation of amount of 124
Compensation security for 51
Compensation may be reduced or suspended when 136
Compensation Law:
  application of 7
  plan and purpose 5
  employments subject to the act 7
  injuries subject to the act 8
  must provide a remedy to be exclusive 26, 28, 29, 32

[REFERENCES ARE TO PAGES]

Compensation Law (continued).
constitutionality 4, 73, 170
does not impose a burden on interstate commerce.... 168
history of legislation.... 4
elective provisions 4, 89
follows employees of vessels.... 37
application to railroad employees.... 39
application to vessels 37
annotated 73
liberally construed 137
Compensation Law, annotated 73
Compensation Law, application of 7, 73
Compensation Law declared constitutional....4, 73, 170
Compensation Law, plan and purpose.... 5
Compensation Law not exclusive unless remedy provided....27, 28, 29, 32
Compromise of action to recover penalty and award.... 140
Compromise of action against third party.... 142
Compulsory, act is.... 4
Compulsory provision (Sec. 10)....111, 112
Concurrent awards 122
Confectionery, mfg. of.... 81
Conflicting evidence 133
Consecutive awards 122
Constitutional amendment authorizing comp. legislation.... 218
Constitutional questions 4
partial invalidity 170
Constitutionality of Compensation Law....4, 73, 170
Construction, questions of:
accident, defined 8, 9
"arising out of," construed.... 8
"in the course of".... 8
diseases, when accidental.... 107
rules for interpreting the act.... 175
Contractor independent 43
Contractor employee of.... 207
Contributory Negligence:
abolished as defense, when.... 113
defense to be pleaded when....209, 210
in action for death.... 219
Conveyances, riding in employer's.... 10
Co-partner, employer, when not.... 93
Costs and fees.... 138
Court of Appeals, appeals to.... 136
Court, Supreme, Appellate Div. Third Dept., appeals to.... 136
Coverage—State Insurance Fund 57
Creation of State Fund.... 159
Cross-examination of claimant.... 133
Crossing track, subway construction.... 79
Custody of State Fund.... 159
Cutting glass 80

D

Damages against third parties....45, 141
Damages by next of kin....28, 114, 128
Damages for loss of services.... 32
Damages for occupational diseases 33, 34

[REFERENCES ARE TO PAGES]

Death, action for 28
Death, constitutional provisions 218
Death, action for under code 219
Death Benefits 125-131
  funeral expenses 126
  wife married subsequent to accident 126
  for children, how paid 126
  common law wife 127
Death, compensation for 11, 125
Death when compensatable 107
Death, resulting from accident 107, 108
Death, not resulting from accident 108
Decision of Commission final on question of fact 132, 133
Decision of Commission, when final 5, 132
  appeal from 6, 136
Decision by majority of Industrial Board sufficient 153
Defense, insurance fund 210
Defenses, common law abolished 113
Definitions 91-111
Degree of dependency 128
Delirium tremens 107
Delivery on foot 83
Demolition 110
Dependency:
  of sister and parents 128
  on minor 128
  of mother and grandmother 128
  question of fact 11, 128
  degree of 128
  what constitutes 129
  "during dependency" 129
  purchase of house, contribution for 129
  hearsay evidence does not establish 129
  where deceased is a minor 129
Dependents receiving no compensation may sue 28, 114, 128
Dependents of unmarried employee 128
Dependents, who are 11, 125
Depositing future payments 140
  present value 141
  trust fund created 141
  with State Fund 141
Depositions 157
Deputy commissioners, powers of 154
Determination of claims 131-134
  Commission final on question of fact 133
  conflicting evidence 133
  evidence examined on appeal 6, 133
  whether any evidence, a question of law 133
  cross-examination of claimant 133
  reversal for refusal to reopen case 133
  award by consent affirmed 134
  unfair decision reversed 134
  arbitrary decision reversed 134
  findings without evidence 134
Disability, compensation for 118
Disability, must exceed two weeks 114
Disability, previous 124, 125

[REFERENCES ARE TO PAGES]

Discharge from work, injury after 79
Disease causing injury 105
Diseases resulting from accidental injuries:
anthrax 88, 99
delirium tremens 107
insanity 88, 99
heart disease 107
pneumonia 107, 108
gangrene 104
tetanus 107
pulmonary tuberculosis 107
peritonitis 107
pleurisy 108
typhoid fever 108
cancer 108
septicaemia 108
poison from ivy 88, 99
Diseases when not accidental:
blood poisoning 108
pneumonia following accident to arm 108
apoplexy 109
Diseases, occupational 82
See "Occupational Diseases"
Disfigurement 26, 114
Disfigurement, compensation for 128
Disinfecting stables 86
Distinction between hazardous and non-hazardous employments 20
Distinction between interstate and intrastate commerce 42
Doctor:
See "Medical Treatment"
Domestic servants 18, 94
Doubtful employments 16
Driver of automobile 92
Driver in non-hazardous employments 91
Drowning 102
Drowning, unexplained 76
Drugs, mfg. of 82
Druggists 18, 82
Dual employments 18
Dual liability—truck drivers 14
"During dependency" 129

E

Ear, amputation of 26
Ear, loss of, damages for 121, 122
Earnings, basis of compensation 116
Earnings, when tips are 109
Election of remedies:
for failure to insure 118
injury on navigable waters of U. S. 87, 77
negligence of third parties 45, 141
Election to come within act, how made 89
Elective act 4, 89, 210
Elective provision of compulsory act 4, 89, 90
Electric meat chopper 88

[REFERENCES ARE TO PAGES]

Elevators 18, 86, 87
Elevators, operation of 87
See "Operation of Elevators"
Emergencies, acts during 108
Employee:
defined 94
injured outside the state
when entitled to compensation 84, 94
when not entitled to compensation 84, 94
signing false statement to obtain employment 95
may release employer, when 210
when not a co-partner 98
of contractor 207
when not an independent contractor 95
operating a dredge under lease 95
independent contractor, when entitled to compensation 95
engaged in non-hazardous employment 20, 95, 96
casual 23, 88, 96
police officer 96
officer of corporation, when an employee 30, 96
captain of vessel leased to another 96
operating own motor boat 96
repairing farm buildings 96
employed and paid by another employee 96
operating threshing machine 97
piece workers 97
of foreign states 35, 95, 97
engaged in interstate commerce 39, 168
injured, examination of 131
not within the act 12
recourse to insurance contract 147
refusal to submit to medical examination 131
all in affected industry not covered 20, 25
state 88, 89
municipal 88, 89
extra 117
seven-day 116
Employers:
defined 92
conducting non-hazardous employment 20, 92, 98
general and special, both liable 15, 98
liability for compensation discharged, how 147
report of accident by 167
repairing building, not liable for compensation 98
of truck drivers 93, 94
who is, a question of fact 95
furnishing employees to another 94
two classes subject to act 8
conducting both hazardous and non-hazardous employments 98
hiring truck, liability of 98
when not a co-partner 98
municipal corporations 88, 92
state 88, 92
information to be furnished by 167
inspection of records 167
may be sued as third party causing injury 148
Employers' liability for injuries 206
Employers' Liability Act 205

[REFERENCES ARE TO PAGES]

Employment:
defined 97
casual 22
doubtful 16
dual 18
exempted 18
non-hazardous 20
distinction between hazardous and non-hazardous 20
seasonable 117, 124
Employments subject to the Act 7
Employments exempted by the act 18
domestic servants 18, 94
farm laborers 18, 19, 94, 98
private chauffeurs 19
private estates 19
charitable institutions 19
hospitals 19, 98
churches 19, 98
clubs 19, 98
schools 19
colleges 19
universities 19
any employment not conducted for pecuniary gain 19, 97
Embalming 91
Enforcement of payment of compensation 189
English decisions, consideration given 187
Evidence, rules of 155
Examination of injured employee 181
Examination of State Fund by Insurance Department 166
Exceptions unnecessary on appeals 188
Exclusive liability 113
Exclusive remedy 113
Expenses of burial 125
Expenses of administering Compensation Law 158
Expenses of administering State Fund 160
Extra employees 117
Extra-territorial effect of compensation law 84, 74
Eye, injury to, when not accidental 100

F

Facts, decision contrary to reversed 184
Fact, question of
See "Question of Fact"
Facts, failure to report, effect of 185
Failure to insure, effect of 113, 146
Failure to give security for compensation 113, 146
Failure to report facts 185
Falling from building 103
Falling caused by disease 105
Falling on floor 103
Falling from landing 78
Falling from ship 76
Falsification of payrolls 165
Farm accidents 19, 94
Farm building, repair of 96, 98
Farm laborers 19, 94

[REFERENCES ARE TO PAGES]

Fault, disregarded in compensation legislation..... 111
Federal Employers' Liability Act..... 220
application of 89
See "Interstate Commerce"
Fees of lawyers and doctors, subject to approval..... 188
Fees and mileage of witnesses..... 156
Fellow servants, negligence of..... 118
Fellow employees, assaults by.....101, 106
Findings without evidence..... 184
Fingers, loss of use..... 120
Fireman working in interstate commerce..... 41
Foodstuffs, preparation of.....18, 16, 88
See "Preparation of Meat and Foodstuffs"
Foreign employees 85, 95, 97
Foreign law recognized in New York..... 86
Foreign states, employees of.....84, 95, 97
Foreign vessels excluded 86
See "Operation of Vessels"
See "Longshoremen"
Foreman assaulted by employees..... 101
Forms:
See "Rules"
Forms, Commission to furnish..... 157
Freezing 88, 99
Freight, elevators 87
Frolicking, injuries from.....105, 107
Frost bite, accidental.....88, 99
Fumes, inhaling, accidental when..... 100
Future payments, deposit of..... 140

G

Gang plank, longshoreman injured on..... 77
Gangrene resulting from accident..... 104
Garage 92
Gases, inhaling poisonous, accidental..... 100
General employer 15, 98
Going to and from work.....10, 79
Glass and glass products..... 80
Grandmother and mother as dependents..... 128
Grandparent and parent both dependent.....11, 128
Grounds for review of award or agreement.....181, 186, 157
Groups of hazardous employments.....74-89
Rule for construction of..... 78

H

Hand, loss of use, what constitutes..... 121
Handtruck, operation of..... 86
Handy man employed by druggist..... 82
Hazard, basis of compensation (Part I, Sec. 2)..... 5
See "Arising out of," etc.
Hazardous employments:
groups 74-89
alphabetical list of..... 195
defined 91

[REFERENCES ARE TO PAGES]

Hazardous employments (continued).
employments added in 1916 200
operation of garage 92
application of law to groups of 78
ice harvesting 92
lumber yards 92
what is not:
embalming 91
wholesale dealer 91
operation of theatres 91
hotel 91
undertaking 91
repair of building, casual 28
Hazardous employments determined by Legislature 58, 68
Hearsay evidence does not establish dependency 129
Hearsay evidence, award based on 155
Heart disease from overwork 107
Heat prostration from boiler 100
Helper on vehicle 86
Hernia 99
Hiring truck, liability of employer 98
History of compensation legislation 4
Horses, care of 86
Horses, dispute concerning 101
Horse play, accidents caused by:
See "Frolicking"
Horse shoeing 81
Horse shoers 17
Hospital:
See "Medical Treatment"
not conducted for pecuniary gain 98
Hotels and restaurants 91
employees preparing food 88
House, purchase of, contribution for 129
Humanity, risk in line of 108

I

Ice harvesting 14, 77, 92
Illegitimate child 110
Incidental to the employment, risk must be 5
exposure must be peculiar to the work (Part I, Sec. 4) 8
unusual exposure to natural hazards (Part I, Sec. 4) 8
See "Arising out of, etc."
Incomplete protection of State Fund 57, 58
Increase of wages of minor 118, 129
Indemnity agreement must cover compensation 148
Independent contractors, defined 43
Independent contractor, when an employee 45
Independent contractor may sue for negligence 45
Independent contractor, when entitled to compensation 95
Individual grouping, State Fund 161
Industrial diseases 82
See "Occupational Diseases"
Industrial Commission:
award by 182
creation and organization of 151

[REFERENCES ARE TO PAGES]

Industrial Commission (continued).
decision of quorum sufficient 153
individual commissioners, powers of 154
jurisdiction of 151
may determine whether insurance policy is in force 149
may make rules 154
may examine injured workmen 181
office of 153
powers and duties of 151, 153, 154
reports 157
review of agreements and awards 182
sessions of 153
Industries, classification of 74-89
List of hazardous employments 95
See "Hazardous Employments"
Infection, accidental 88, 99, 108
Injuries. See "Arising out of, etc."
See "Accidental Injuries"
defined 8, 99
schedule of 118-125
previous, effect of 124, 125
caused by negligence of third persons 141
See "Negligence of third persons"
death, must result from 107
resulting in disfigurement 26, 123
resulting in death 107
constitutional provision 218
code provision 219
subject to the act 8
three requisites must exist 8
accidental, defined 8, 9
for which no compensation is provided 26
received outside the state 84, 94
after discharge from work 79
Injury to the eye from light 88, 100
Injury from dust 88, 100
Injury to traveling salesman 24, 25
Injuries resulting in death 28, 107
constitutional provision 218
code provision 219
distribution of damages 219
contributory negligence, a defense 219
Injury on dock 77
Injury on land 88, 77
Injury on navigable waters 88, 77
Injury on shore 88
Insanity, when accidental 88, 99
Insolvency of employer does not release carrier 148
Inspection of plants of employers in State Fund 166
Inspectors 18
Installing machinery, salesman 80
Insurance Carrier 51
Insurance carrier, defined 110
Insurance carrier to reimburse State for expenses of Commission 158
Insurance by mutual companies 54
Insurance by stock companies 54
Insurance companies liable to workmen, when 147
Insurance of medical treatment 57

[REFERENCES ARE TO PAGES]

Insurance contract 51, 147
recourse of Commission..... 147
knowledge of employer binds carrier..... 148
insolvency of employer does not release carrier..... 148
indemnity agreement must cover compensation..... 148
cancellation 148, 149
Industrial Commission may determine whether policy is in force.. 149
Intentional injury 111, 112
Intoxication 112
In the course of the employment:
See "Arising out of, etc."
"In the course of" defined..... 10
Interpretation of the act, rule for.....68, 73
Interruptions in work..... 10
Interstate Commerce 39, 75, 168
what constitutes 41, 42, 43
leading cases 41
street surface railroads..... 43
remedy of railroad employees..... 39
repair shops 75
employees in, are subject to act.....40, 168
rule for determining what is..... 42
burden upon, does not render law unconstitutional..... 168
vessels engaged in.....37, 168
railroad employees engaged in.....40, 168
street railroads may be engaged in..... 43
Interstate Commerce, what is:
repairing loaded car..... 41
fireman piloting locomotive..... 41
repairing bridge 41
clerk checking interstate cars..... 41
fireman preparing engine..... 41
brakeman shifting cars..... 42
Interstate Commerce, what is not:
working on repair shop..... 41
switching intrastate freight..... 42
working in coal mine..... 42
new construction work..... 42
abandoned instrumentalities 42
repairing cars 169
switching empty cars..... 169
working on new telegraph line..... 169
watchman on new construction work..... 169
taking inventory 169
Intrastate Commerce
See "Interstate Commerce"
Invalidity of portion, not to affect whole act..... 170
Investment of surplus of State Fund..... 160

J

Janitors 80
operating boiler 80
chopping wood 81
Janitor engaged in mechanical work..... 88
Judgment, award may be docketed as..... 140

[REFERENCES ARE TO PAGES]

Jurisdiction of Commission:
modification of award 136
upon medical services 115
continuing 157
see "Appeals," "Questions of Fact"

K

Knowledge of employer binds carrier 148

L

Labor law article, Article 14 205
Elective compensation provisions 210-215
Labor Law violations 54
Land, injury on 88, 77
Land, longshoreman injured on 77
Law, question of 188
may be certified to Appellate Division 186
appeal may be taken on 186
Lead poisoning, not accidental 88, 101
Leaving premises 10, 79, 108, 104
Legal representative 114
Legal services 188
Liability for compensation 111, 112
Liability, dual—truck drivers 14
Liability, exclusive 118
Liability of employer, discharged how 147
Liberal construction of statute 187
Lien, compensation prior 145
Lien for legal services 188
Lien for medical services 188
Lightning, accidental 100
Limitation of amount of compensation 124
Limitation of right to compensation 141
List of hazardous employments 195
Lodging and board included in wages 110
Loss of arms, hands, legs, etc. 119
Loss of ear, damages for 121, 122
Loss of services 82
Loss of use of finger, compensation for 120, 121
Loss of use of hand, what constitutes 121
Longshoremen 77
optional remedies 87
sorting refuse 77
injured on vessel 77
injured on land 77
injured on gang plank 77
ice harvesting, not longshore work 77
loaned to another firm 78
watching cargo 78
watching boats 78
Longshore work 75
See "Operation of vessels"
Lumber yards 92
Lunch, injury while taking 104, 106

[REFERENCES ARE TO PAGES]

Lump sum settlements 140
for aliens 129

M

Machinery, salesman installing 80
Mailing letter after work 105
Manager of hotel 91
Marriage after accident 126
Master and servant, liability between 205
Maximum compensation 124
Meals, leaving work to eat 108
Meals on premises 104, 106
Meat, preparation of 17, 88
See "Preparation of Meat and Foodstuffs"
Mechanics employed casually 28
Medical examination 181
rule for 178
Medical services, lien for 188
Medical treatment 115
jurisdiction of Commission 115
physician, designation of 115
physician cannot sue employer 115
suit by hospital 116
Medical treatment, insurance of 57
Method of computing compensation 116
Mining 96
Minimum compensation 124
Minors 54
Minor, increase of wages considered 118, 129
Minor, limitation does not run against 170
Minor may make election to come within act 90
Minor may elect to sue third party 47
Minor, parents dependent upon 128
Minor children, compensation, how payable 126
Misdemeanor:
failure to give security for compensation 146
misrepresentation to obtain State insurance 165
disclosing information 166
Misrepresentation to obtain insurance in State Fund 165
Model employed in manufacture of clothing 84
Modification of award 186
Mother and grandmother, both as dependents 128
Motorcycle, injury while cleaning 102
used in work 102
Municipal corporations 88, 89, 98
Municipal employees 88, 89
Mutual insurance 54

N

Navigable waters, injury on 38, 77
Negligence of third persons 45, 141
rule for election of remedies 189
employee may elect to sue or take compensation 141
release of third party does not bar compensation 142

[REFERENCES ARE TO PAGES]

Negligence of third persons (continued).
employee may sue third party without complying with compensation law 142
minor workman may make election 143
opposite elections by different dependents 143
when employer may be sued as third party 143
award of compensation bars suit against third party 144
compensation for deficiency 141
compromise of suit 142
(See Part I, Section 24, p. 45)
Negligence, contributory 208, 210
See "contributory negligence"
Negligence, disregarded in compensation legislation 111
Negligence of fellow servants 113
Negligence, not controlling 113
Nervous shock, when accidental 33, 99
New construction work 42
New York amendment to constitution 218
Non-hazardous employments 20
See "Hazardous employments"
Notice of accident to Commission 130
Notice of accident, failure to give may be excused 130
Notice of decision of Industrial Commission 132
Notice of claim for compensation 131
Notice regarding compensation, posting 146
Notice to employer of accident 130
Notice of hearing, rule for 177
Notice of injury, when waived 130, 131
Notice under Employers' Liability Act 207
identification of accident 208
defective, effect of 208
sufficiency of 208
waiver of 208

O

Occupations, law applies only to hazardous 8, 73
Occupational diseases 32
what are:
cramped hand 101
lead poisoning 32, 33, 101
joint stiffened 101
injury to eye from light 33, 100
injury from dust 33, 100
what are not:
freezing 33
poison ivy 33
anthrax 33
exhaustion from overwork 33
damages may be recovered for 33, 34
Office of Industrial Commission 153
Office buildings, see "Office Employees"
Office employees 29
are not engaged in manufacturing work 30
Officers of corporations 30, 96
driving automobile 92
when entitled to compensation 31
when an employee 96

[REFERENCES ARE TO PAGES]

Operation, death following 107
Operation of elevators 80, 87
superintendent of building 87
watchman 87
using freight elevator 87
operator falling on stairs 87
Operation of vehicles 19, 85
stableman 85
caring for horse 86
disinfecting stables 86
loading and unloading wagon 86
helper 86
porter operating hand truck 86
delivery on foot 86
clerk unloading 86
elevators are not included within 86
traction engine 97
Operation of vessels 36, 37, 75, 76
optional remedy of employees 37
dual liability of employers 38
longshore work is not 75
captain assisting in unloading 76
of foreign state 76
oiler on foreign vessel 76
sharing profits 76
unexplained drowning 76
wife of captain, services of 76
falling from landing 78
Optional remedy of longshoremen 37
Optional remedy of employees of vessels 37
Optional remedy where employer is not insured 118
Optional remedy, injury caused by third party 45, 141
Optional method of insuring 145

P

Painter 95, 98
Pain and suffering, action for 27
Parent dependent upon minor 11, 128
Parents and grandparents, both dependent 11
Parents and a sister as dependents 11, 128
Partial permanent disability 119
Partners 76, 98
Payments, advance 134
Payments of compensation, how made 139
Payment of expenses of State Fund 160
Payment of premiums in State Fund 164
Pecuniary gain:
casual repairs not conducted for 22, 24
employments not carried on for, excluded 18, 19, 97
wholesaler is not conducting storehouse for 97
hospital not conducted for 98
Salvation Army not conducted for 98
municipal corporations not engaged in business for 98
repair of farm buildings not conducted for 98
boat club not operated for 98
how determined 19

[REFERENCES ARE TO PAGES]

Penal Law, violation of to obtain employment..... 95
Penalties for failure to pay compensation..... 139
Penalties for false representation 170
Penalties for falsifying payroll 165
Penalties for misrepresentation to obtain State insurance..... 165
Penalties for violation of the act.....5, 146
Penalties, waived when 146
Penalties to apply on expenses of Commission..... 166
Penalties for disclosing information 166
Peritonitis, following accident..... 107
Permanent total disability..... 125
Personal Assaults:
See "Assaults"
Personal injury defined..... 99
Phalange, loss of part..... 120
Physical examination of injured employee..... 181
Physician:
See "Medical Treatment"
Physician, designation of..... 115
Physician cannot sue employer..... 115
Physicians' fees subject to approval.....115, 138
Physicians' services for injured workmen.....115, 138
Piece workers 97
Piece workers at home..... 85
Pile driving 78
Plan and purpose of Compensation Law..... 5
Plant defined 207
Pleurisy 108
Pneumonia resulting from accident.....107, 108
Poison ivy 33, 99
Poison taken by mistake..... 102
Poisonous gases 100
Police officer 96
Police power 113
Porter operating hand truck..... 86
Posthumous child 110
Powers of individual commissioners..... 154
Powers of secretary..... 154
Preferences 145
Premises, employee residing on..... 104
Presumptions 135
failure to report facts..... 135
evidence of accident to create..... 135
effect of 135, 136
Previous disability 124, 125
Previous disease, aggravation of..... 108
Preparation of meat 17
Preparation of foodstuffs 13, 16
Preparation of meat and foodstuffs.....16, 83
does not include hotels, restaurants and domestic servants..... 83
electric meat chopper..... 83
retail meat markets..... 83
delivery on foot..... 83
ice harvesting for..... 84
Present value of award..... 141
Private chauffeur 19
Private estates 19
Procedure under the act.....131, 153

[REFERENCES ARE TO PAGES]

Procedure, rules for 175
Procedure before arbitration committee 182
Procedure of Commission, manner of 155
Property man in theatre 91
Protecting wagon 102
Public liability 55
Pulmonary tuberculosis 107
Punishment of witnesses 156
Purchase of house, contribution for 129
Purchasing and sales agent, not covered 25
Questions of fact:
determination of loss of use 121
determination of employer 94
decision of commission final 5, 132, 133
dependency is 11, 128
determination of wages 118
assumption of risk 208, 209
Questions of law:
appeals limited to 132, 133
may be certified to Appellate Division 136
arbitrary decision, reversed as 134
where no evidence to support findings 133, 134

R

Railroad employees 39, 74, 168, 169
when entitled to compensation 39, 40, 43
testing watch 74
watchman struck by train 74
See "Interstate Commerce"
Railroad employees engaged in interstate commerce 40, 168
Railroad Law, Section 64 216
Railroad Law, action under 216
Railroad Law, application of 217
Railroad Law, superseded when 217
Rain, injury while seeking shelter from 102
Reaching street from subway 79
Readjustment of rates in State Fund 60
Recourse of Commission to insurance contract 147
Release from payment of compensation 59
Release of compensation prohibited 144
Release of employer in State Fund 59
Release from liability 147
Release of third party does not bar compensation 142
Release of third party by employee, effect of 142
Relief associations 144
Relieving nature 79
Religious corporations, as employers 19
Remedies, common law and statutory superseded 113, 114
Remedies, election of
for failure to insure 113
injury on navigable water of U. S. 38, 77
negligence of third parties 45, 141
Rent, included in "earnings" 110
Re-open case, reversal where Commission refuses 133
Repair, included with manufacture, construction, operation and installation 110

[REFERENCES ARE TO PAGES]

Repairs, casual 28
Repair of buildings 98
Repair shops 75
Repairing bridge 41
Repairing loaded car 41
Repeal of acts 170
Report of accidents by employers 167
Report of State Insurance Fund 166
Requirements in classifying employments in State Fund 162
Requirements for adjusting rates in State Fund 162
Respondeat superior 118
Review of agreements 182
See "Appeals"
Review of decision of Industrial Commission 186
See "Appeals"
Risk, must be incident to employment (Part I, Sec. 4) 8
Risks of the street 106
Risks during work intervals 10
Risks of personal assault 101, 106
Risks incidental to the employment (Part I, Sec. 4) 8
Rule for application of statute 68, 73
Rules adopted by Commission:
Form of notices 176
To what offices notices shall be sent 176
Which statements under oath 176
Proof of average daily wages 176
Notice of presentation of claim 177
Witness put under oath 177
Claim for compensation 177
Who may examine 177
Who may inspect 178
Secretary shall digest the evidence 178
Medical examination of claimants 178
Order in dealing with claim 178
Reference of claim to medical director 178
Special investigation through deputies 179
Reference of all communications to the actuary 179
Passing upon claim 179
Action upon award by commissioner or deputy commissioner 179
Action upon report of arbitrators 180
Hearing judicial but not formal 180
Stenographer's report of hearings 180
Requisites to application for review 180
Docketing of papers 181
Employees receiving or disbursing money to give bond 181
What employers and what employees subject 181
Rules for computing weekly wages 182
Revision of award for reduction of earning capacity 182
Ruling as to lien for physician's services, etc 183
Time for making periodical payments 183
Method of paying compensation 183
When commuted and sued for 183
Paying present value into state fund 184
Methods of paying compensation 185
Commuted value demanded of insolvents 185
Physician's fees, etc., need not be insured 185
Policies of companies must insure all entitled 186
Condition of remitting penalty for non-compliance 186

[REFERENCES ARE TO PAGES]

Rules adopted by Commission (continued).
Commission to supply blanks..... 186
Expense accounts of commission..... 186
Classifying employments of a single employer..... 187
How interstate and foreign commerce employers may comply..... 187
Hours of sessions..... 187
When physician's bill not to be considered..... 187
Employees insured in state fund..... 187
Premiums payable to state fund..... 188
How disbursements from state fund made..... 188
Monthly session to consider report of state fund..... 188
Form of state fund accounts..... 188
Readjustment of premium payroll to state fund..... 189
Time for paying premiums to state fund..... 189
Repeal, amendment of adoption of rules..... 189
Subrogation to remedy of employees..... 189
Rule for determining what is Interstate Commerce..... 42
Rule for suit against third party..... 189
Rules, power to make..... 154
Rupture, an accident..... 99

S

Sailors, accidents to
See "Longshoremen"
See "Operation of vessels"
Salesmen 24, 25
Salesman, falling on stairs..... 82
Salesman, employed in manufacture of clothing.....84, 85
Salesman, traveling 24
Salesman installing machinery 24, 80
Salesman and buyer for wholesaler..... 91
Salvation Army 98
Schedule of Compensation.....118-125
loss of remaining member..... 119
temporary total disability 119
temporary partial disability 119
phalange, loss of part..... 120
tip of finger..... 120
loss of finger 120
loss of use of finger, compensation for.....120, 121
Schedule of specific injuries..... 118
Schools 19
Scope of employment:
See "Arising out of, etc."
Scuffle over horses..... 101
Seasonable employments 117, 124
Secretary, powers and duties of..... 154
Self-insurance 54
Septicaemia 108
Servants, domestic 18, 94
Sessions of Industrial Commission..... 153
Settlement of suit against third party..... 47
Sharing profits, operation of vessels..... 76
Sheeting work 78
Shelter from rain..... 102

[REFERENCES ARE TO PAGES]

Ships, accidents to sailors:
See "Longshoremen"
See "Operation of vessels"
Shore, injury on 88
Short cut to place of work 104
Sister and parents as dependents 128
Slippery floor causing injury 103
Sorting refuse 77, 82
Special employer 15, 98
Specific compensation shall be in lieu of all other 122, 123
Stableman 85
State, as an employer 88, 92
State not liable beyond premiums 61, 159
State employees 88, 89
State Insurance Fund:
appeals by employers 66
administration of 65
compared with stock and mutual companies 54
coverage 57
incomplete protection 58
violations of Labor Law covered 59
release from payment of compensation 59
release of employer 59
readjustment of rates 60
State not liable beyond premiums 61, 159
assessments 61
Immunity 62
creation of State Fund 159
custody of funds 159
payments of expenses of 160
surplus and reserve 159
investment of 160
classification of risks 161
adjustment of premiums 161
individual grouping 161
associations for accident prevention 162
inspection of plants of employers 166
examination by Insurance Department 166
requirements in classifying employments 162
requirements for adjusting rates 162
payment of premiums 164
collection of premiums 164
withdrawal of employers 164
assessments after withdrawal 165
audit of payrolls 165
falsification of payroll 165
misrepresentation to obtain insurance 165
report of State Insurance Fund 166
employer cannot appeal 187
State legislation on workmen's compensation, history of 4
Statutory remedies superseded 118
Stenographic report of proceedings 157
Step child 110
Stock company insurance 54
Stockholder in corporation as employee 81
Storage 13, 14, 82, 88
Storehouse 97
Storeroom, injury in 88

[REFERENCES ARE TO PAGES]

Stone crusher 88
Strain, injury from..... 99
Street railroads may be engaged in interstate commerce..... 43
Street risks 106
Street surface railroads 43
Strike-breaker, assault upon..... 104
Subpoena 156
Subsequent accidents 124, 125
Subway construction 79
reaching street 79
crossing tracks 79
injury after discharge..... 79
attending call of nature..... 79
Subrogation against insurer..... 147
Subrogation in action against third persons.....45, 141
Subrogation to remedy of employees.....45, 141
rule for 189
release by employee, effect of..... 142
recovery limited to amount of compensation..... 143
(See Part I, Sec. 24, page 45)
Suits against third persons.....45, 141
rules for 189
See "Negligence of Third Persons"
Surplus and reserve of State Fund..... 159
investment of 160
Suspension of death benefits..... 129
Switching empty cars 169
Switching intrastate freight 42

T

Tailor working at home..... 85
Taking inventory 169
Taking poison by mistake..... 102
Temporary partial disability..... 123
Testing watch 74
Tetanus, accidental 107
Theatres 91
Threshing machine, operation of..... 97
Time of beginning or stopping work..... 10
Tip of finger..... 120
Tips, when included in "earnings"..... 109
Toes, loss of..... 120
Toilet, injury in..... 105
Traction engine, operation of..... 97
Trade risk, basis of compensation legislation (Part I, Sec. 2)..... 7
Transcript of minutes..... 157
Traveling salesmen (Part I, Sec. 12)..... 24
See "Salesmen"
Trench cave-in 108
Truck drivers 14
Trust fund created.....140, 141
Tuberculosis 107
Typhoid fever 108

[REFERENCES ARE TO PAGES]

U

Unconstitutionality of portion of act, effect of..... 170
Undertaking 91
Union men, assault by..... 104
Universities 19
Unexplained drowning 76
Unfair decision reversed..... 184
Unloading vessel 76
Unloading wagon 86
Unmarried employee, dependents of..... 128
Use, loss of 121
Use, loss of, question of fact..... 121

V

Vehicles 85
See "Operation of Vehicles"
Vessels, operation of..... 75
See "Operation of Vessels"
Vessels engaged in interstate commerce..... 168
Vessels, repair of 86, 75
Vessels, optional remedy of employees..... 87
Vessels in foreign waters.....86-88
Vessels, longshoreman injured on..... 77
Vessels of foreign states and countries excluded.....86, 75
Violation of the act, penalties.....5, 146, 165, 166
Violations of Labor Law:
Employment secured by..... 95
Injuries caused by.....84, 54, 55
State Insurance Fund covers..... 59

W

Wages:
basis of compensation..... 116
seven day employees..... 116
extra employees 117
seasonable employments 117, 124
determination of, question of fact..... 118
of minors, increase of.....118, 129
free board as 110
free rent as 110
defined 109
tips 109
percentage of winnings..... 109
deduction from by employer prohibited..... 144
Wagon, workman protecting..... 102
Waiting period 114
Waiver agreement void..... 144
Waiver of notice of injury under Liability Act..... 208
Waiver of penalty 146
Walking on railroad track..... 105
Watch, testing 105
Watching cargo 78

[REFERENCES ARE TO PAGES]

Watching boats 78
Watchman on new construction work..... 169
Watchman 74, 87
Watchman struck by train..... 74
Water, injury on 88, 97
Water, leaving work to get drink..... 108
Wholesale dealer 91
Wholesaler not conducting storehouse for pecuniary gain..... 97
Widow and children, preferred as dependents..... 11
Widow and children, amount of compensation.....11, 126
Widower must be an actual dependent.....11, 126
Wife, common law..... 127
Wife, marriage subsequent to accident..... 126
Wife of captain, services of..... 76
Willful misconduct 112
Winnings, percentage of..... 109
Withdrawal of employers from State Fund..... 164
Witnesses:
  punishment of 156
  fees and mileage of..... 156
Words construed:
  See "Definitions"
Work, reporting for 102
Work, going to and from.....10, 79
Work, injured while preparing for..... 102
Work, injuries after 105
Work, interruptions in 10
Work, intervals for meals, etc.....104, 106
Work, temporarily doing for another employer..... 108
Work, piece 97
Work, see "Arising out of, etc."
Working in coal mine..... 42
Working on new telegraph line..... 169
Workmen, loaned to others..... 94
Workmen, who are, under the act..... 94
  See "Employees"
Workmen, injured, examination of..... 131
Workmen's Compensation, history of 4
Workmen's Compensation distinguished from other liability..... 8
Workmen's Compensation Commission abolished 151
Workmen's Compensation Insurance 51, 145, 147
Workmen's Compensation Law, annotated 73
Workmen's Compensation Law constitutional 4
Workmen's Compensation Law, application of 73

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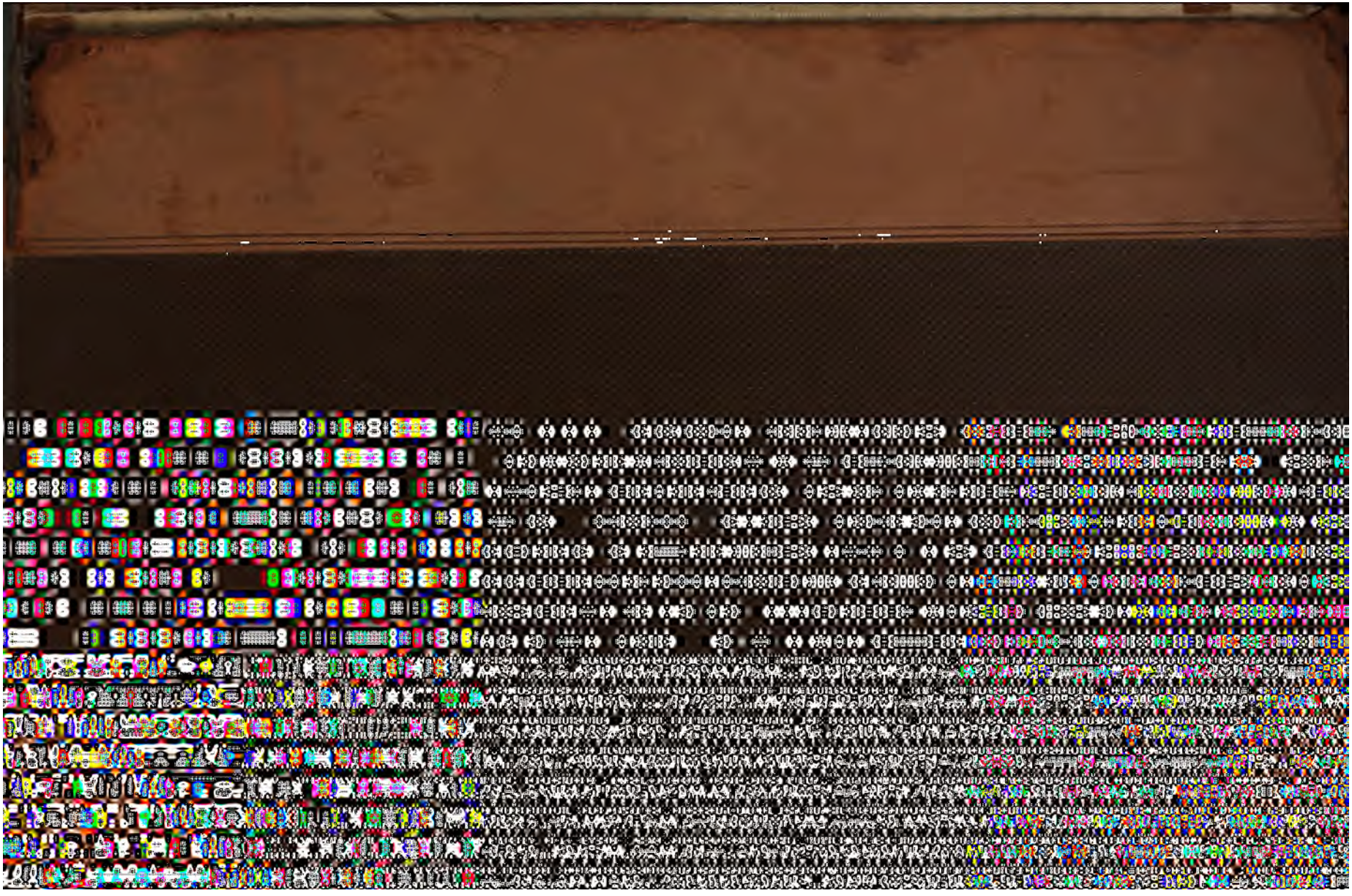
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